

89-553

Supreme Court, U.S.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO. _____

ROBERT C. GUCCIONE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

- I. Whether the intentional tort exception to the Federal Tort Claims Act bars a claim for negligent supervision by a federal employee of a non-employee who commits an intentional tort.
- II. Whether the intentional tort exception to the Federal Tort Claims Act bars claims for negligent supervision by a federal employee of a person whenever the intentional tort is "work-related."
- III. Whether negligent supervision may provide the basis for liability under the Federal Tort Claims Act for a foreseeable intentional tort by a government employee.
- IV. Whether a claim for negligent supervision by federal employees is not actionable under the Federal Tort Claim Act because



federal supervisory personnel owe no duty of care to persons who may be injured by their supervisees.



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INTRODUCTION

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STATUTES INVOLVED

28 U.S.C. §1346(b) (1982) provides:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2680(h) (1982) provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to --

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.



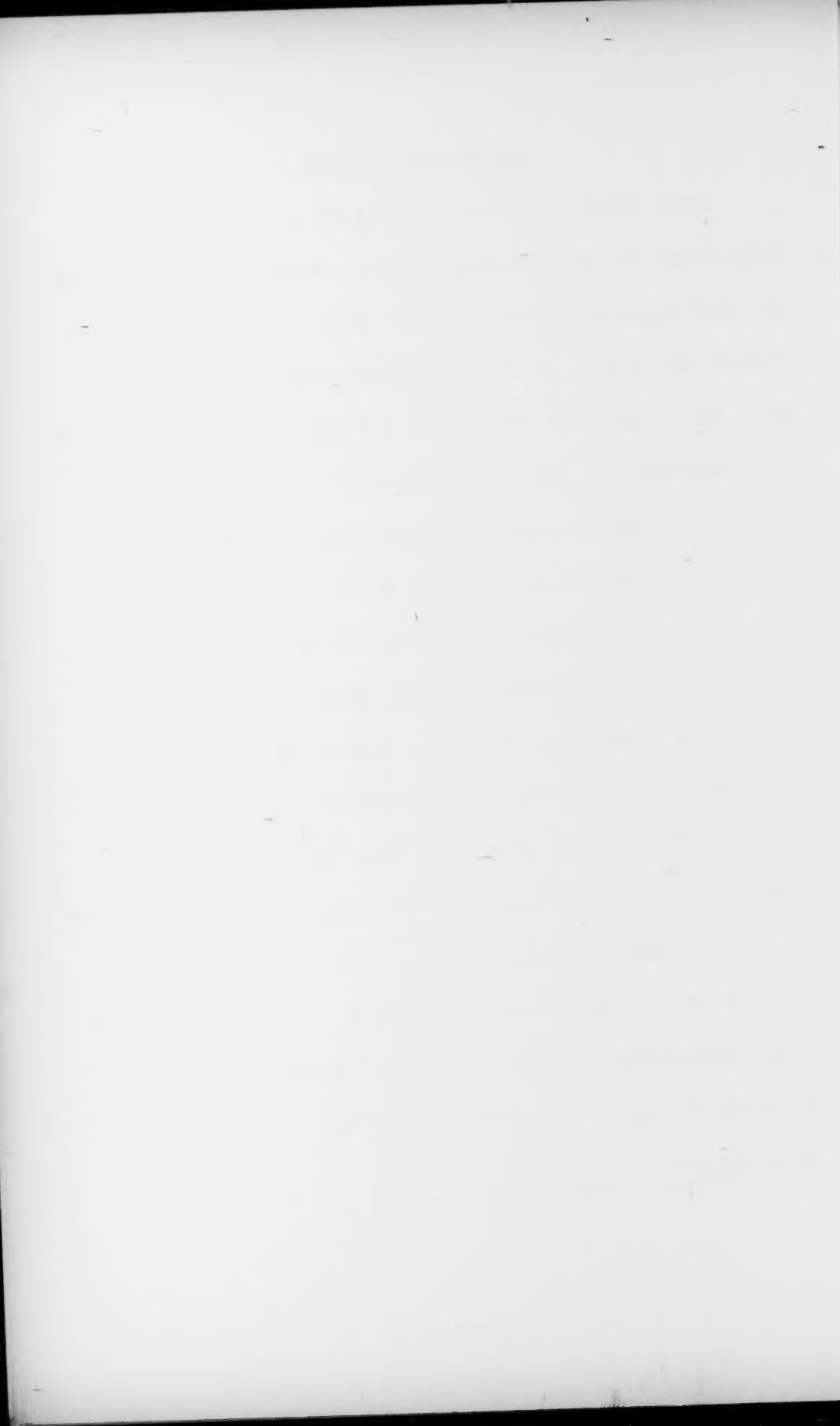
OPINIONS BELOW

The decision of the district court is reported at 670 F.Supp. 527, and is reproduced in the appendix at A-22. The decision of the Court of Appeals for the Second Circuit dated May 26, 1988 is reported at 847 F.2d 1031, and is reproduced in the appendix at A-3. The opinion issued upon rehearing, dated June 9, 1989, is reported at 878 F.2d 33, and is reproduced in the appendix at A-19.

JURISDICTION OF THE COURT

The judgment of the Court of Appeals for the Second Circuit was entered on May 26, 1988. The order denying the petition for rehearing and rehearing en banc was entered on July 6, 1989. (A-1)

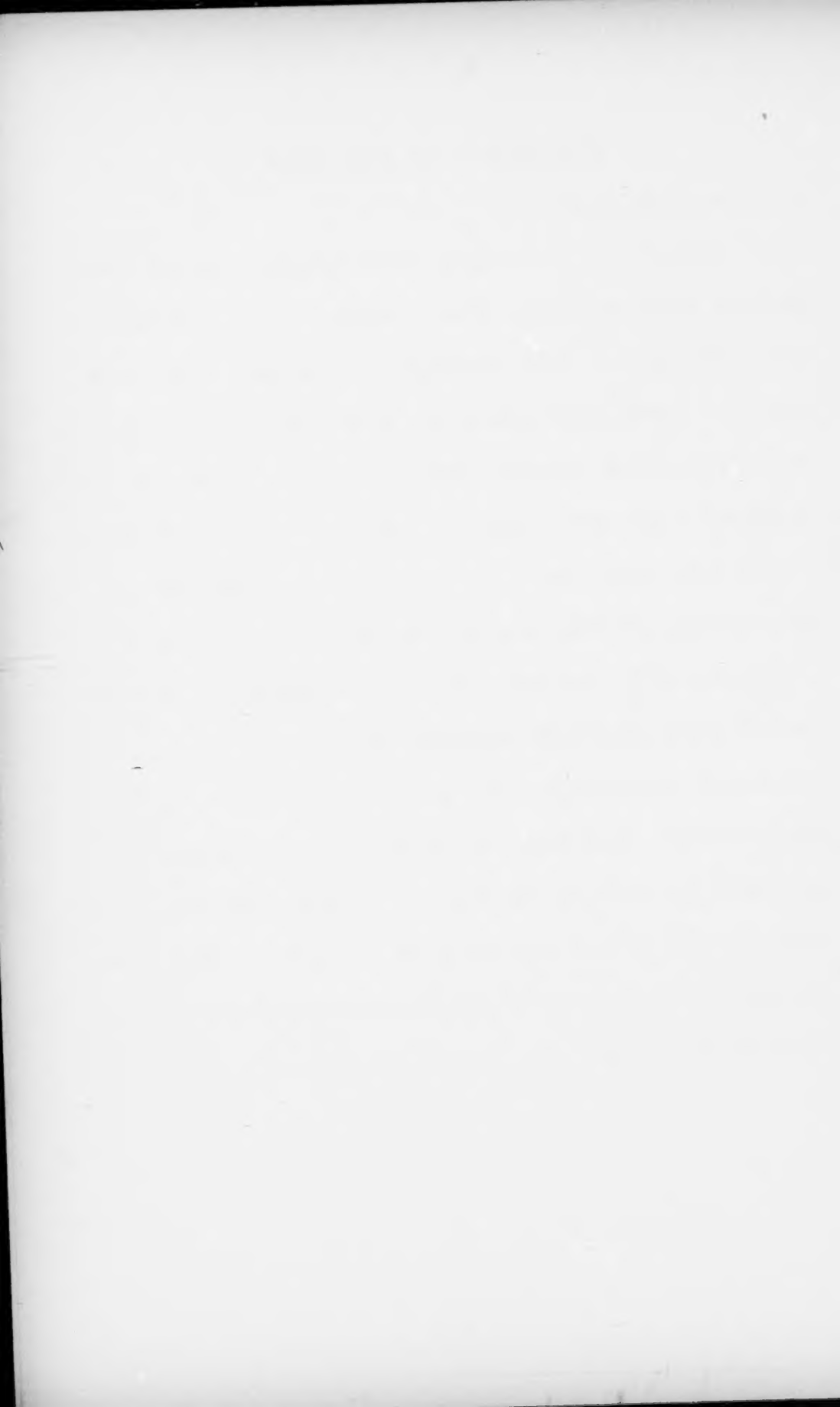
The jurisdiction of this Court to review the judgment of the Court of Appeals for the Second Circuit is invoked under 28 U.S.C. §1254(1).



STATEMENT OF THE CASE

a. The Complaint

Robert C. Guccione ("Guccione") sued the United States under the Federal Tort Claims Act ("FTCA"). His complaint charged that the FBI had been negligent in its conduct of its covert ABSCAM investigation. Specifically, he charged that FBI agents' negligent supervision and other negligent conduct during ABSCAM permitted an FBI operative, Melvin Weinberg ("Weinberg"), to engage in a crusade to punish Petitioner for his refusal to engage in criminal activity. As part of this punishment, Weinberg sabotaged Petitioner's attempt to secure necessary financing for a casino and hotel project in Atlantic City, New Jersey, causing Petitioner substantial financial loss.



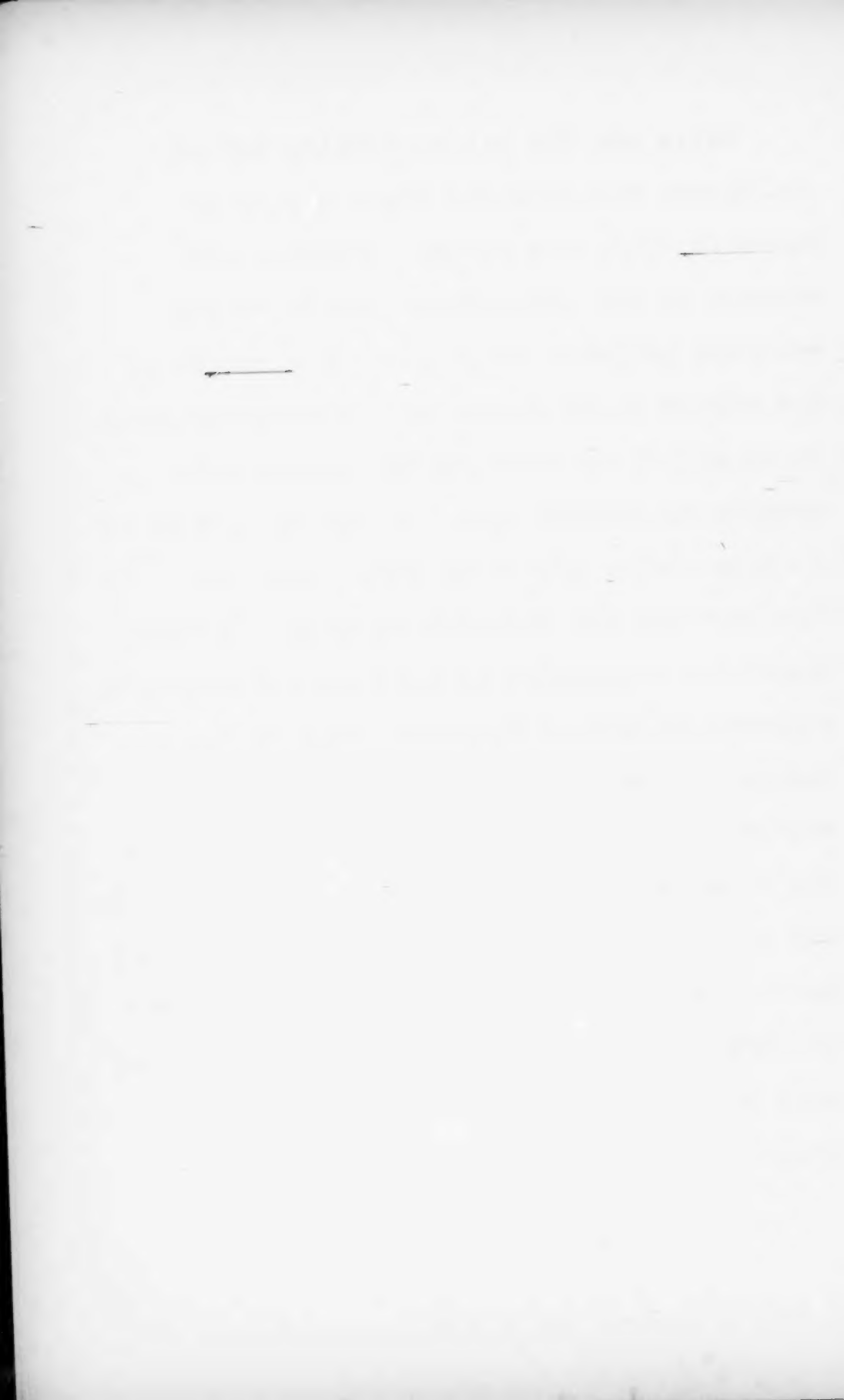
Weinberg was not an employee of the FBI, but the FBI used him as an undercover operative.¹ At the time the FBI knew that Weinberg had a history of involvement in fraudulent and illegal activities. Indeed, it was precisely because of that history that the FBI selected him to pose as an agent of Abdul Enterprises, a fictitious Arab investment company.

¹The Department of Justice's own guidelines on FBI use of Informants and Confidential Sources expressly state that "informants and confidential sources are not employees of the FBI." Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice to the United States Senate at 518 (1982) (hereinafter "Senate Report").

Indeed, in a prior lawsuit, the government vehemently argued that "it is clear [Weinberg] is not an employee of the FBI [He] is clearly not an employee." (CAA.94-95) (References in the form "CAA" followed by a number refer to pages in the Appendix filed in the Court of Appeals; those in the form "A" followed by a number refer to pages in the Appendix to this Petition.)



While the FBI was conducting ABSCAM, Petitioner was constructing a casino in Atlantic City, New Jersey. Without any reasonable law enforcement justification, Weinberg targeted Petitioner as a victim of the ABSCAM sting operation. Apparently first in an effort to pressure Petitioner into committing illegal acts (including bribery of a state casino official) and, later, to "punish" him for refusing to do so, Weinberg undertook a campaign to sabotage Petitioner's attempts to secure financial backing for his casino project. As a direct result of Weinberg's activities, Petitioner was denied the necessary financial backing he needed. It was only after an exculpatory and explanatory Senate Report was published and disseminated to lenders that Petitioner learned why he had been unable to get the financing he had sought.



b. The Senate Report

While it was going on, the ABSCAM operation was shrouded in secrecy. After indictments were returned against those targets who did commit crimes, information relating to ABSCAM insofar as it involved those targets was made public. However, because Petitioner had resisted Weinberg's efforts, there was no indictment and no public disclosure of Weinberg's campaign against Petitioner until a Senate Report ["the Report"] which focused on the undercover operation was made public on December 15, 1982. That Report included a section which dealt exclusively with the investigation of Petitioner Guccione (CAA.129-36), and contained transcripts of conversations between Weinberg and others which had been tape recorded by the FBI.



The Report highlighted the particularly egregious conduct directed against Guccione during ABSCAM. It noted:

Informant Melvin Weinberg's contacts with one individual in the course of ABSCAM were particularly sustained, overbearing, and unjustified by a prior reasonable suspicion. Because the individual, publisher and businessman Bob Guccione, resisted Weinberg's repeated inducements and pressure to become involved in a bribery conspiracy, the incident never became the direct object of a court's attention under either the entrapment doctrine or the "outrageous conduct" standard of the due process clause of the Fifth Amendment to the Constitution. Nevertheless, the Guccione events provide a chilling reminder of the risks imposed by lax procedures and inadequate supervision of an informant like Weinberg, by allowing him wide discretion in the targets he selects and in the scenarios with which he approaches those targets and by failing to replace him early in the undercover operation with an undercover special agent. (CAA.129)



The Senate Report disclosed for the first time that Weinberg had made false and defamatory remarks to others about Guccione. (CAA.130) It reported that Weinberg had told Guccione's business associates that Abdul Enterprises had investigated Guccione and had found problems with his financial position, his organized crime connections, and his ability to receive a casino license. These statements were defamatory. Similarly, the Senate Report noted:

Telephone toll records and recorded tapes reveal that, in late March and early April 1979, Weinberg began speaking frequently with Torcasio [an employee of Penthouse Magazine, of which Guccione was publisher], Dinallo [president of Terminal Construction Corp.], and others, usually in order to make derogatory comments about Guccione. (CAA.131-32)



Despite Guccione's explicit refusals to participate in any illegal activity, Weinberg continued his campaign.² As the Report states:

Weinberg followed his performance with an orchestrated plan to sabotage Guccione to induce him to commit a crime. He immediately telephoned Torcasio and Errichetti's [Mayor of Camden, New Jersey, convicted and imprisoned as a result of ABSCAM] secretary and misrepresented Guccione's statements at their meeting,

²The Report quotes Guccione's response to Weinberg's efforts to induce him to commit bribery and his suggestion that Guccione was involved with organized crime:

Guccione: No way Mel, let me, let me give you this. This is on the heads and the eyes of my children. I have five children, alright? On the eyes of my children, I am not connected with anybody. I am totally my own man. I am 100 percent owner of all of my companies, I owe nothing to nobody, nobody sits on my back, nobody has any pull with me. No one and least of all anybody like that, who is likely to cause me problems in getting licenses and that sort of thing. (CAA.132-33)



maligned him, and attempted to injure his relationship to Torcasio. (CAA.133)

Finally, once Weinberg realized he could not induce Guccione to commit a crime, he graphically expressed his intention to punish Guccione:

Weinberg suggested, "The best way to punish him [Guccione], he doesn't get the fucking place built -- that punishes more than anything else."
([Deleted]) (CAA.134)

He carried out that threat.

The Senate Report concluded:

The unsuccessful pursuit and manipulation of Guccione by the undercover operatives provides a glaring example of the risks posed to innocent citizens by the government's reliance upon unsavory informants and dishonest middlemen, when they are given wide latitude to develop scenarios and select targets of their investigation. Because Guccione resisted all inducements and pressure to engage in criminal activity, no criminal prosecution of him resulted. Nevertheless, Guccione was the victim of undue interference by Weinberg



in his business associations,
unjustified manipulation of his
business prospects, and
unreasonable targeting.
(CAA.135)

c. The Lawsuit

After the Department of Justice issued final denials of administrative claims filed by Guccione, pursuant to 28 U.S.C. §2675, on July 18, 1984 and November 28, 1984, Petitioner filed suit against the United States in the United States District Court for the Southern District of New York. The suit charged that the FBI employees who oversaw the ABSCAM operation were negligent in their handling of the matter. The United States undertook extensive and costly discovery of plaintiff; at the same time, it refused to comply with the Guccione's requests for relevant facts. Finally, on July 18, 1986, Petitioner moved for a default judgment based on the government's willful failure to comply



with the court's repeated discovery orders. The affidavit in support of the motion noted for example that, on the central issue in the case, "the negligent mismanagement by the FBI of certain operatives, most particularly Melvin Weinberg" "the government has not produced a single official FBI report, memorandum or record of internal communication between Weinberg and his control, FBI Special Agent John Good." (emphasis added)

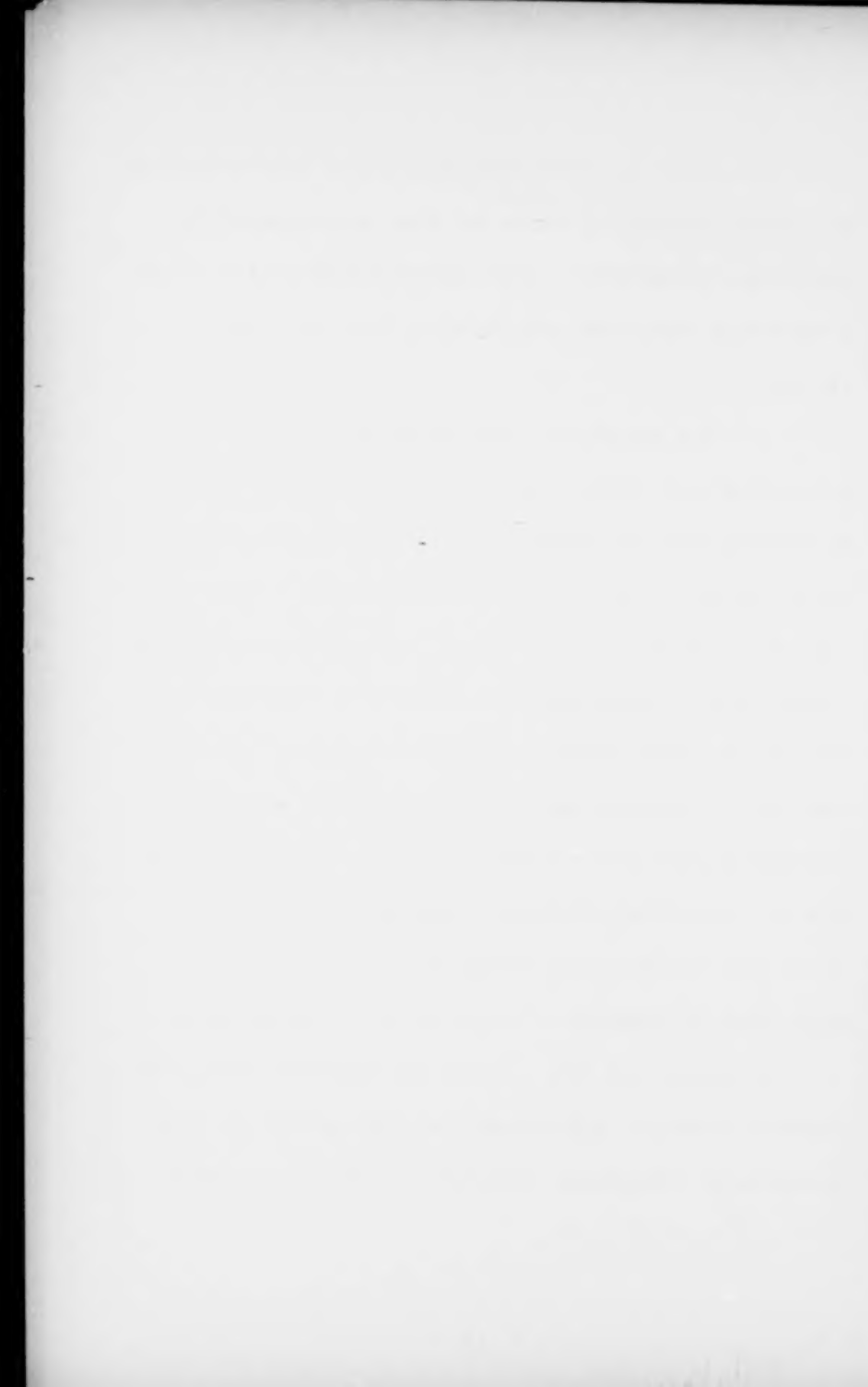
Shortly after the sanction motion was referred by District Judge Constance Baker Motley to a magistrate, the United States moved to dismiss on the ground of sovereign immunity. Immediately after Petitioner submitted his papers in opposition to that motion, the United States filed a motion for summary judgment on the basis of the statute of limitations.



On July 6, 1987 the district court issued an order granting both of the government's motions. (CAA.571) Two months later it filed a written opinion explaining her ruling. (A-22)

In its opinion, the district court acknowledged that the question of whether Weinberg was an "employee" of the federal government, under the FTCA, raised a genuine issue of fact. (A-39-40). Nevertheless, the lower court entered judgment for the United States on the ground that the action was barred by sovereign immunity under the "intentional tort exception" to the FTCA, 28 U.S.C. §2680(h) (1982), and alternatively, that the action was time barred under the applicable two-year statute of limitations.

A panel of the Court of Appeals for the Second Circuit affirmed the decision on the sovereign immunity ground, withholding any



opinion on the propriety of the district court's dismissal pursuant to the statute of limitations. (A-3) In a dramatic departure from well-established precedent, the panel held that the employment status of the intentional tortfeasor was irrelevant to the determination of whether the intentional tort exception applied to a claim of negligence against the federal government. Rather, it held that the United States is not liable for the intentional torts of a non-employee who is carrying out the government's business even where the claimant alleges a claim of primary negligence on the part of the government employees in failing to supervise or otherwise avoid foreseeable risks.³

³In addition, the panel rejected plaintiff's assertion that, by knowingly exposing him to an operative who had, on frequent occasions, expressed his intention to "destroy" and "punish" him, the government assumed an affirmative duty to protect the plaintiff from the effects of that operative's crusade.

(footnote continued)



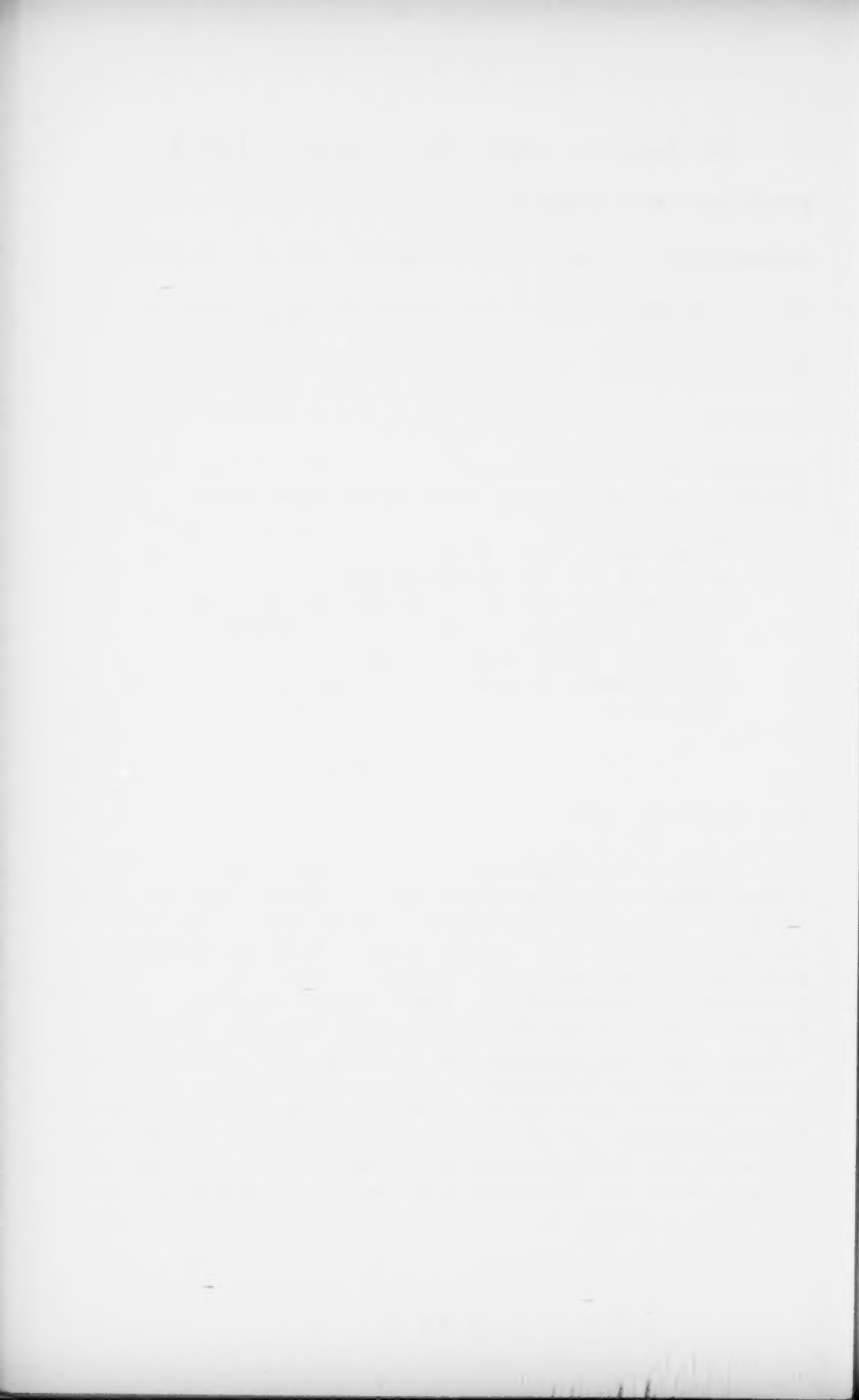
On June 9, 1988, Petitioner filed a petition for rehearing and suggestion for rehearing en banc. Two weeks later, this Court rendered its decision in Sheridan v. United States, __ U.S. __, 108 S.Ct. 2449 (1988).

(footnote continued from previous page)

"The mere fact that Guccione was the subject of an undercover investigation by the FBI gave rise to no special 'affirmative duty' to protect Guccione independent of the government's duty to supervise its agents."

847 F.2d at 1037.

While acknowledging that such an independent duty exception is evolving in other circuits, the panel held that the exception did not apply where the government was carrying out its "basic function" -- presumably suggesting that this "basic function" was being furthered during the course of the operative's crusade. This assertion is directly at odds with the conclusions and criticisms documented in the Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice to the U.S. Senate, SA 159-162 (1982).



In Sheridan, suit was brought under the FTCA for injuries the complainant sustained when Carr, an intoxicated, off-duty serviceman, fired shots into an automobile. The plaintiff's claim was based upon alleged negligence of Navy corpsman in allowing the drunken serviceman to leave a Naval Hospital with a loaded rifle. Reversing the decision of the Court of Appeals, this Court held that the suit was not barred by the intentional tort exception. The Court reasoned that (regardless of that exception) the conduct of the off-duty serviceman would not have given rise to government liability and so would not have been within §1346(b)'s general waiver of sovereign immunity. The Court concluded that there was therefore no basis for applying the intentional tort exception to that waiver.



Petitioner brought the Sheridan decision to the attention of the panel and urged that that decision compelled recognition of his right to sue the United States for the acts alleged in his complaint.

On June 9, 1989, the panel issued an opinion rejecting that argument. (A-19) The panel wrote:

Sheridan does not aid Guccione. His claim is based on the negligence of the United States in failing to supervise Melvin Weinberg in his role as an undercover operative in the Abscam investigation. Manifestly, Weinberg's role in relation to the United States is at the heart of Guccione's claim. Though the naval corpsmen in Sheridan may have had a duty to take reasonable steps to prevent any drunken person from leaving their hospital with a weapon, the only duty possibly owed to Guccione by the Government agents with responsibilities for the Abscam investigation was to exercise reasonable care in the supervision of those persons acting in some way to carry out the governmental objectives of that



investigation. Weinberg, unlike the assailant in Sheridan, was carrying out the Government's business during the episode in which he allegedly injured the tort plaintiff, even though he may have exceeded the bounds of proper conduct in the particular way he chose to carry out his assignment. Any negligent supervision on the part of those supervising the Abscam investigation is not "entirely independent" of the relationship between Weinberg and the United States, whether or not Weinberg's status was technically that of an "employee." In such circumstances, the negligent supervision claim encounters the obstacle of the intentional tort exception.

(A-20-21) By order dated July 6, 1989, the Court of Appeals denied rehearing and rehearing en banc. (A-1)



REASONS FOR GRANTING THE WRIT

INTRODUCTION

Those who succumbed to the criminal temptations presented as part of ABSCAM had a remedy for the excesses committed by the government as part of that sting operation. To the extent that the investigation was conducted unfairly, and in violation of targets' Constitutional rights, evidence would be suppressed, or criminal prosecution barred.

Some, however, like Robert C. Guccione, resisted ABSCAM's blandishments, refused to commit crimes, and were punished for that courageous resistance. Under the Second Circuit's decision, those in his position are left without remedy or compensation. As demonstrated below, that unjust result is not compelled by the doctrine of sovereign immunity. Indeed, in enacting the Federal Tort Claims Act, Petitioner contends, Congress



waived governmental immunity from suit to allow victims to recover for damages caused by the negligence of government employers. This case presents the question whether the law leaves an innocent victim of a government sting operation without a remedy.

THE SECOND CIRCUIT
MISUNDERSTOOD SHERIDAN v.
UNITED STATES AND, IN SO DOING,
RESTORED THE FTCA'S INTENTIONAL
TORT EXCEPTION TO A STATE OF
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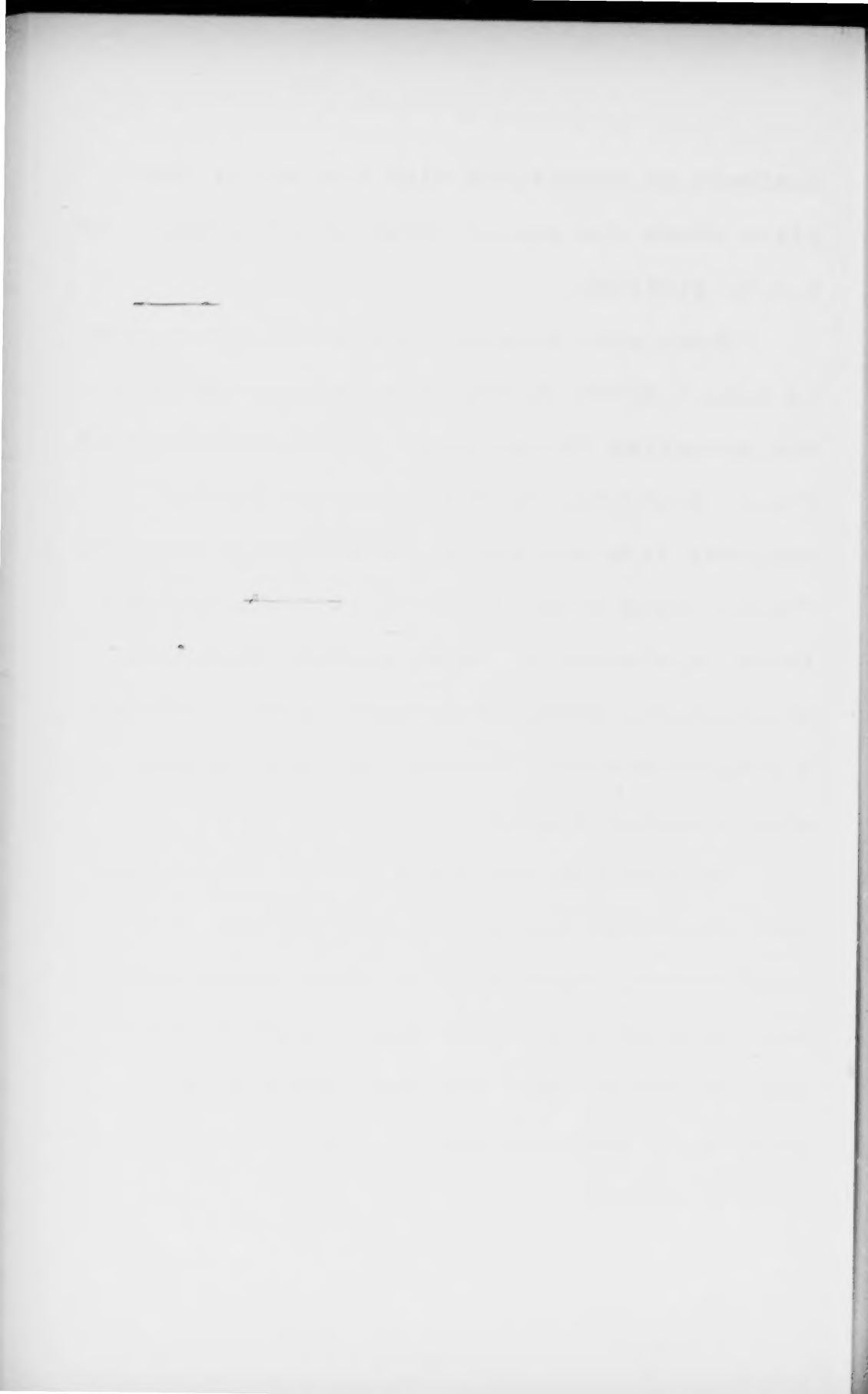
Under the Federal Tort Claims Act, the government has waived immunity from suit for claims of property damage or personal injury caused by the "negligent or wrongful act or omission" of its employees "while acting within the scope of [their] employment, under circumstances where the United States, if a private person, would be liable to the



claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b).

There are, however, statutory exceptions to this limited waiver of sovereign immunity. The so-called "intentional tort exception," 28 U.S.C. §2680(h), is one. Section 2680(h) excludes from the waiver of sovereign immunity "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

Determining the scope of the intentional tort exception has proved exceedingly troublesome, especially in those cases where the claimant's injuries are alleged to have been caused by both the negligence of a government employee and the intentional act of another person.



The law has long been clear -- at least until the Second Circuit's decision in this case -- that, where the other person, the intentional tortfeasor, is not a government employee, the intentional tort exception does not come into play and does not bar the suit. Indeed, it was the opinion in a Second Circuit case, Panella v. United States, 216 F.2d 622 (2d Cir. 1954), authored by then-Judge John Marshall Harlan, which long stood as the leading case for that proposition.

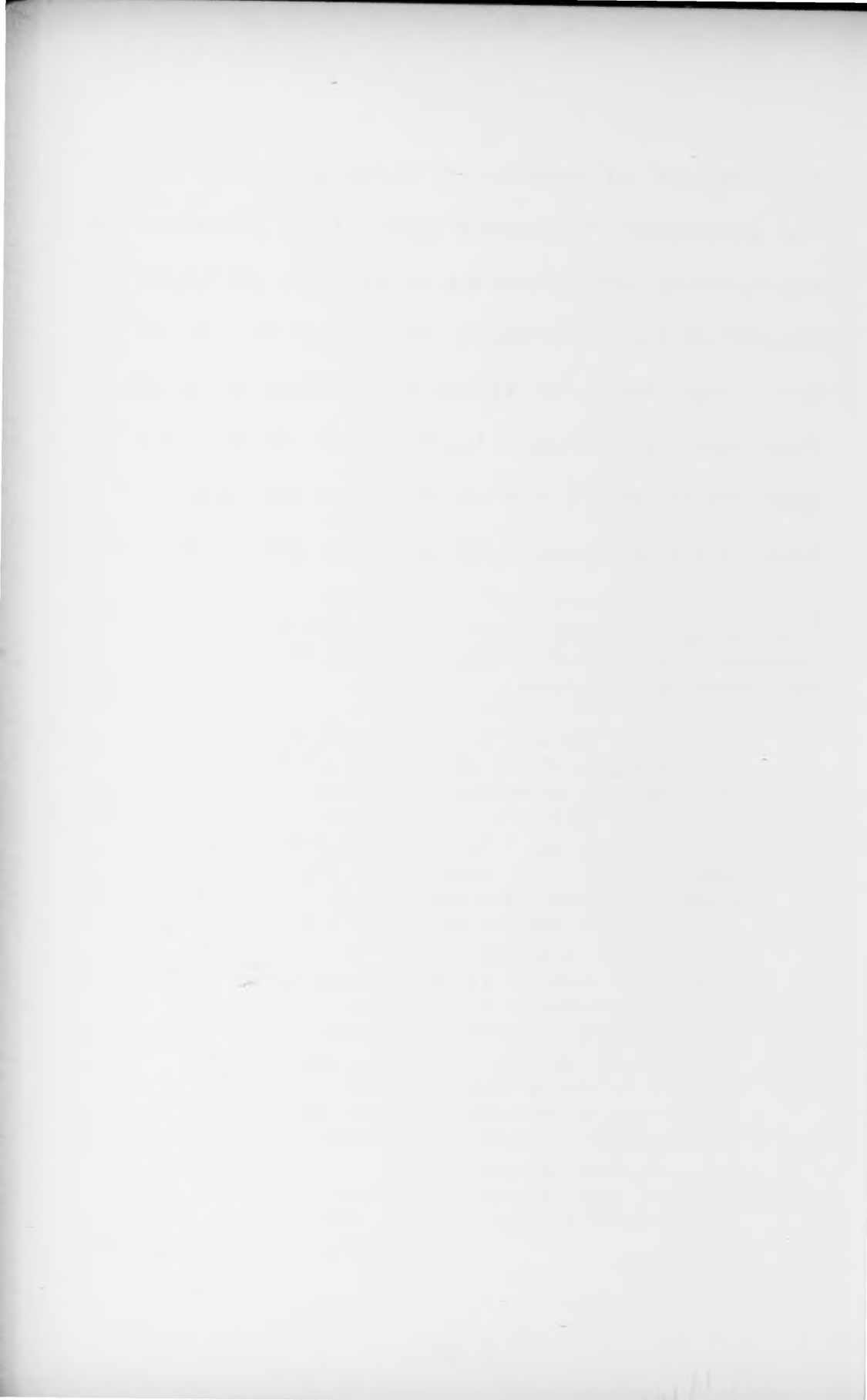
In Panella, the plaintiff, an inmate at a government public health service hospital, was assaulted by another inmate. He argued that the assault was proximately caused by the negligence of the employees of the United States in failing to provide adequate supervision of those in the institution. The district court dismissed the complaint on the ground that the action involved a "claim



arising out of assault," under a theory that the exception "embraced assault by persons not employed by the Government as well as those committed by government employees." Id. at 623. The Court of Appeals reversed holding that the intentional tort exception was not applicable where the alleged intentional tortfeasor was not a government employee.⁴

⁴In rejecting the district court's broader interpretation of §2680, the Second Circuit reasoned as follows:

[S]uch a construction [would be] out of keeping with the rest of the act. For in the present case the only basis of liability against the Government is the negligence of its employees, not their deliberate torts, since the assailant was not a Government employee.... It is therefore important to distinguish cases in which it was sought to hold the Government liable on a negligence theory for assaults committed by government employees In this case, however, a negligence action is not merely an alternative form of remedy to an action for assault but negligence is rather the essence of the plaintiff's claim.... Hence, to
(footnote continued)



The principle of law announced by the Court of Appeals in Panella was uniformly followed by the other Federal Circuits, and was endorsed, implicitly, by this Court.⁵

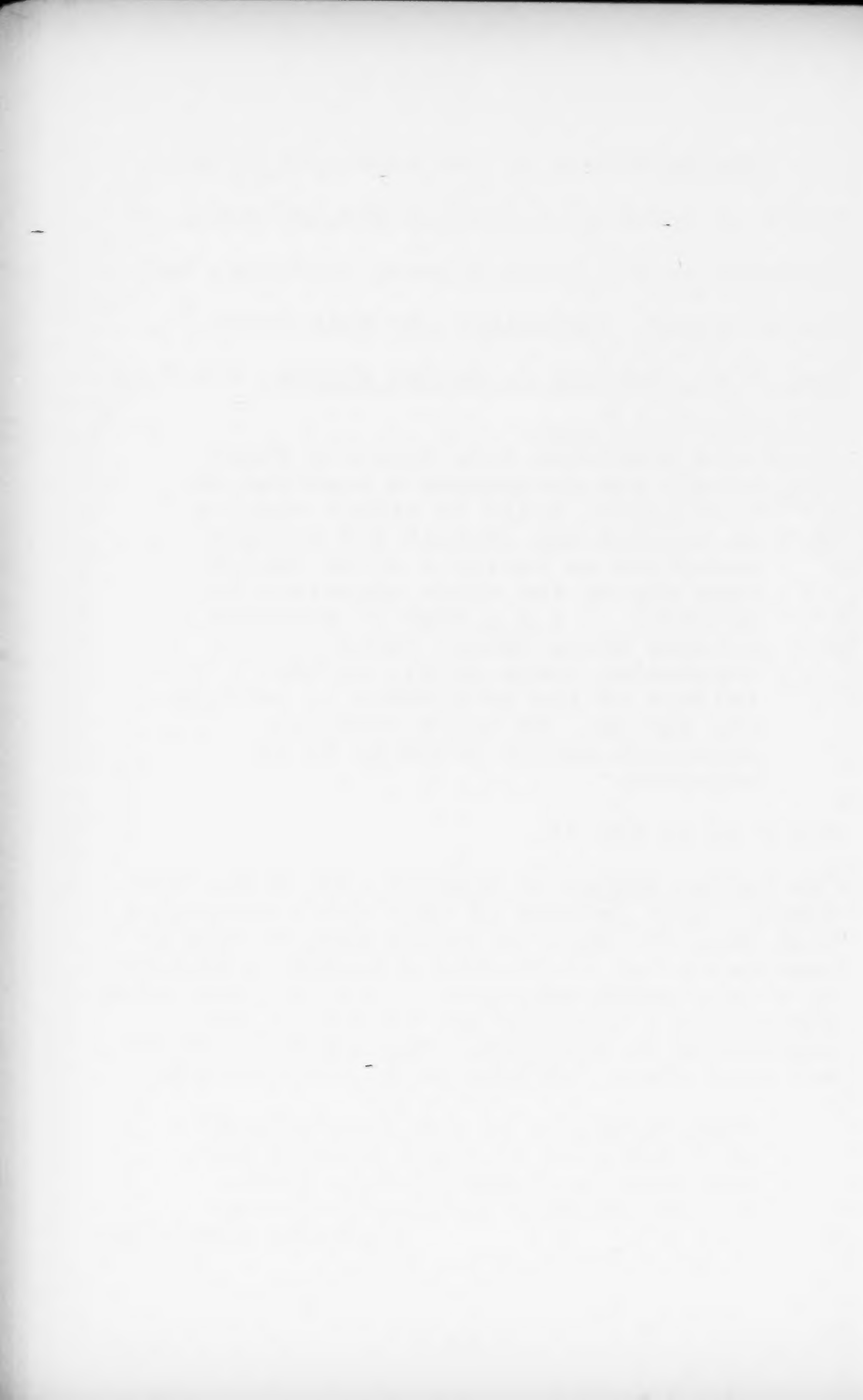
See, e.g., Bennett v. United States, 803 F.2d

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accept the Government's position on this appeal would in effect require us to read the assault and battery exception as having a wider impact than any of the other exceptions in §2680(h) -- i.e., that it embraces actions whose entire legal foundation rests solely on the failure of the Government to perform its duties. We think that the provision cannot properly be so expanded.

216 F.2d at 624-25.

⁵In United States v. Shearer, 105 S.Ct. 3039 (1985), four members of this Court suggested that §2680(h) bars an action that sounds in negligence but stems from a battery committed by a government employee. (This notion, never adopted by a majority of the Court, was repudiated in Sheridan. See infra at 23-26) But even these Justices were quick to note:

Today's result is not inconsistent with the line of cases holding that the Government may be held liable for negligently failing to prevent
(footnote continued)



1502 (9th Cir. 1986); Wine v. United States, 705 F.2d 366 (10th Cir. 1983); Gibson v. United States, 457 F.2d 1391, 1395-97 (3d Cir. 1977); Rogers v. United States, 397 F.2d 12, 15 (4th Cir. 1968). See United States v. Muniz, 374 U.S. 150 (1963) (prisoner who was assaulted by other inmates could recover damages from the United States because prison officials were negligent in failing to prevent the assault that caused his injury).

In Sheridan v. United States, 108 S.Ct. 2449 (1988), this Court clearly recognized the correctness of the rule excluding from the intentional tort exception cases where the intentional tortfeasor was not a government employee. The Court explained why: the

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the intentional torts of a non-employee under its supervision.
See, e.g., Panella v. United States, 216 F.2d 622 (C.A. 2 1954) (Harlan, J.).

105 S.Ct. at 3043.



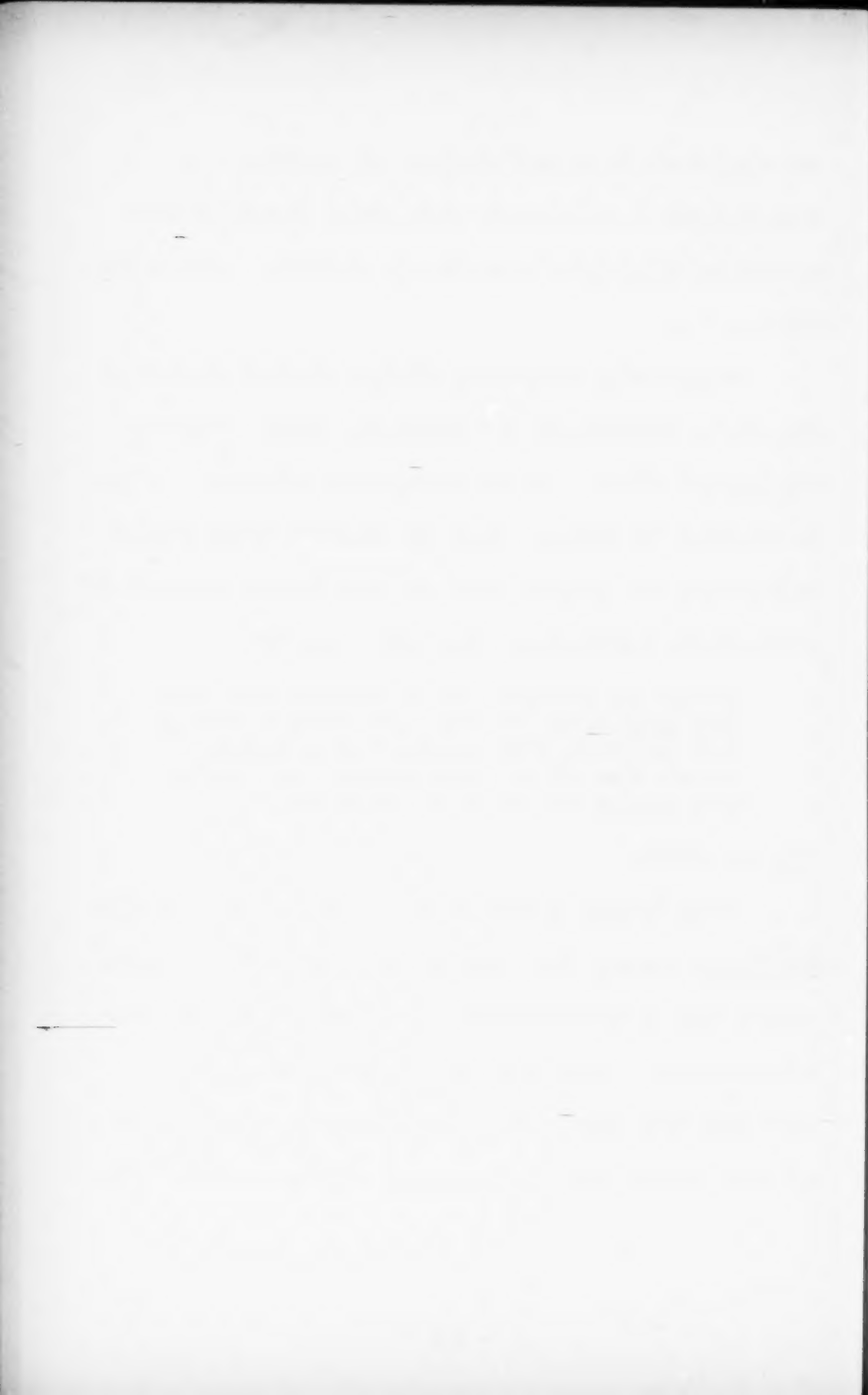
intentional tort exception is simply inapplicable to torts that fall outside the scope of §1346(b)'s general waiver. 108 S.Ct. 2454.

Expressly adopting Judge (later Justice) Harlan's reasoning in Panella, this Court explained that "[t]he exception should ... be construed to apply only to claims that would otherwise be authorized by the basic waiver of sovereign immunity. Id. at 2454-55.

Since an assault by a person who was not employed by the Government could not provide the basis for a claim under the FTCA, the exception could not apply to such an assault....

Id. at 2455.

That legal principle did not resolve the Sheridan case, for the intentional tortfeasor there was a government employee -- an off-duty serviceman. But the basic principle did provide the basis for the Court's resolution of the issue which Sheridan did present. The



Sheridan Court held that, even where the intentional tortfeasor is a government employee, suit is not necessarily barred. The Court asked essentially whether the intentional tortfeasor's acts would have given rise to governmental liability under the FTCA, under the general waiver of immunity. If they would not, then the intentional tort exception would not apply. Because the intentionally tortious conduct of the off-duty serviceman in Sheridan, not acting within the scope of his office or employment (like the intentionally tortious conduct of one not on the federal payroll) could not have given rise to government liability, there was no basis for applying the intentional tort exception in the Sheridan case.

If the intentionally tortious conduct of the government employee would have given rise to governmental liability under the FTCA



(without regard to the intentional tort exception), the Sheridan Court did not say that the intentional tort exception would bar suit, even one which alleged negligence by other federal employees. The Sheridan Court did not reach that question; it was simply not presented. And the Sheridan Court expressly left open the question "whether negligent hiring, negligent supervision, or negligent training may ever provide the basis for liability under the FTCA for a foreseeable assault or battery by a Government employee." Id. at 2456, n.8.

Petitioner maintains that, on this record, it must be assumed that Weinberg was not an employee of the United States government. That being the case, the decision



of the Second Circuit in this case conflicts with Sheridan, confounds well-settled principles, and returns the law to a state of confusion of a magnitude even greater than that which existed prior to this Court's decision in Sheridan.

But assuming arguendo that Weinberg was an employee or that his relationship with the government was such that he could be treated as if he were a government employee, then the Second Circuit's decision still conflicts with Sheridan. At the very least, that decision implicitly -- and, Petitioner asserts, improperly -- decides the important question left open in Sheridan. In addition, the Court of Appeals' decision conflicts with decisions of the Ninth Circuit. For all of these reasons, and because these important issues



will continue to arise frequently, the petition for a writ of certiorari should be granted.



I. On The Record Of This Case, The Courts Were Obligated To Assume That Weinberg Was Not A Government Employee. That Being So, The Intentional Tort Exception Could Not Apply

Melvin Weinberg either was or he was not an employee of the United States government. That factual question is critical to analyzing whether this action may or may not be maintained under the FTCA for, under Sheridan, if Weinberg was not an employee, the intentional tort exception is irrelevant. Sheridan, 108 S.Ct. at 2455.⁶

⁶The Second Circuit, failing to appreciate this, refused to consider whether Weinberg was or was not a government employee. Rather, rewriting Panella and all of the cases which followed that leading case, the Second Circuit held that the issue was not whether Weinberg was an employee, but rather whether there was any "work-related relationship" between him and the federal government. According to the Court, the absence of such a relationship assures that a negligent supervision claim really is the "essence" of the plaintiff's claim, and not a surreptitious way of seeking to hold the United States liable for the intentional torts of those in some way carrying out the government's business. That approach is wholly misguided and inconsistent (footnote continued)



Petitioner's position is simple. In this case, as in Sheridan and Panella v. United States, 216 F.2d 622 (2d Cir. 1954), there are two allegedly tortious acts. The first act is the intentional tort; the second is the act of negligence. In determining whether there is liability on the part of the United States, the status of the intentional tortfeasor constitutes the important first step in the analysis. The intentional tort exception could only come into play (although it would not necessarily bar the suit) if the intentional tortfeasor is a government employee. If a non-government employee commits an intentional tort there would be no initial liability on the government. Sheridan holds -- as did Panella -- that the intentional tort exception should be construed

(footnote continued from previous page)
with Sheridan. Sheridan compels recognition of Petitioner's right to sue the United States under the Federal Tort Claims Act.



to apply only "to claims that would otherwise be authorized by the basic waiver of sovereign immunity." 108 S.Ct. at 2455. For a claim to be "otherwise ... authorized," the intentional tortfeasor must have been acting, during the commission of his intended tort, in a manner which could establish liability upon the government under the FTCA.

In Sheridan, no such liability could be imposed, and thus a claim would not "otherwise be authorized," because the intentional tortfeasor was off-duty at the time he committed the tort. In Panella, as here, no such liability could be imposed, and thus a claim would not "otherwise be authorized," because the intentional tortfeasor was a non-employee.⁷ Pursuant to Panella, and every

⁷ "If nothing more was involved here than the conduct of Carr at the time he shot at petitioners, there would be no basis for imposing liability on the government." Sheridan, 108 S.Ct. at 2455. Thus only if a
(footnote continued)



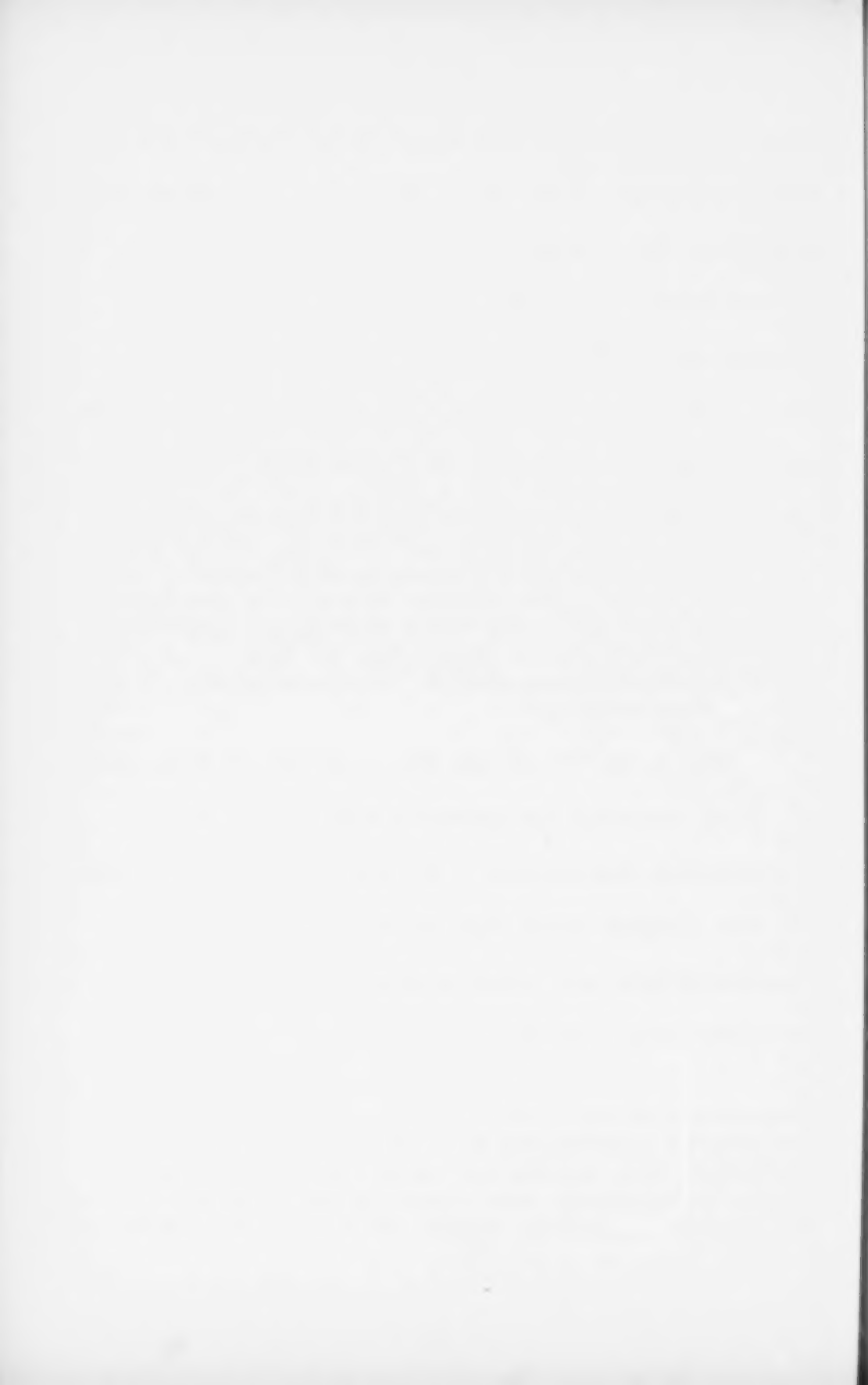
case which has relied upon then-Judge Harlan's seminal opinion in that case, if a person not employed by the government commits the intentional tort, a cause of action is not barred by 28 U.S.C. §2680(h).

The panel's decision in the instant case is the sole exception to that rule.

II. Even If Weinberg's Relationship With The Government Were Such That He Could Be Treated As If He Were A Government Employee, The Second Circuit's Decision Still Conflicts With Sheridan: The Question Under Sheridan Is Not Whether There Was A "Work-Related Relationship"

The area in which the law is in a state of flux relates to intentional torts by government employees. It is only on this side of the ledger that the cases have been inconclusive and inconsistent. Some courts, particularly the Second Circuit, have been

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claimant can establish negligence by some other government employee is there a waiver of sovereign immunity under 28 U.S.C. §1346(b).



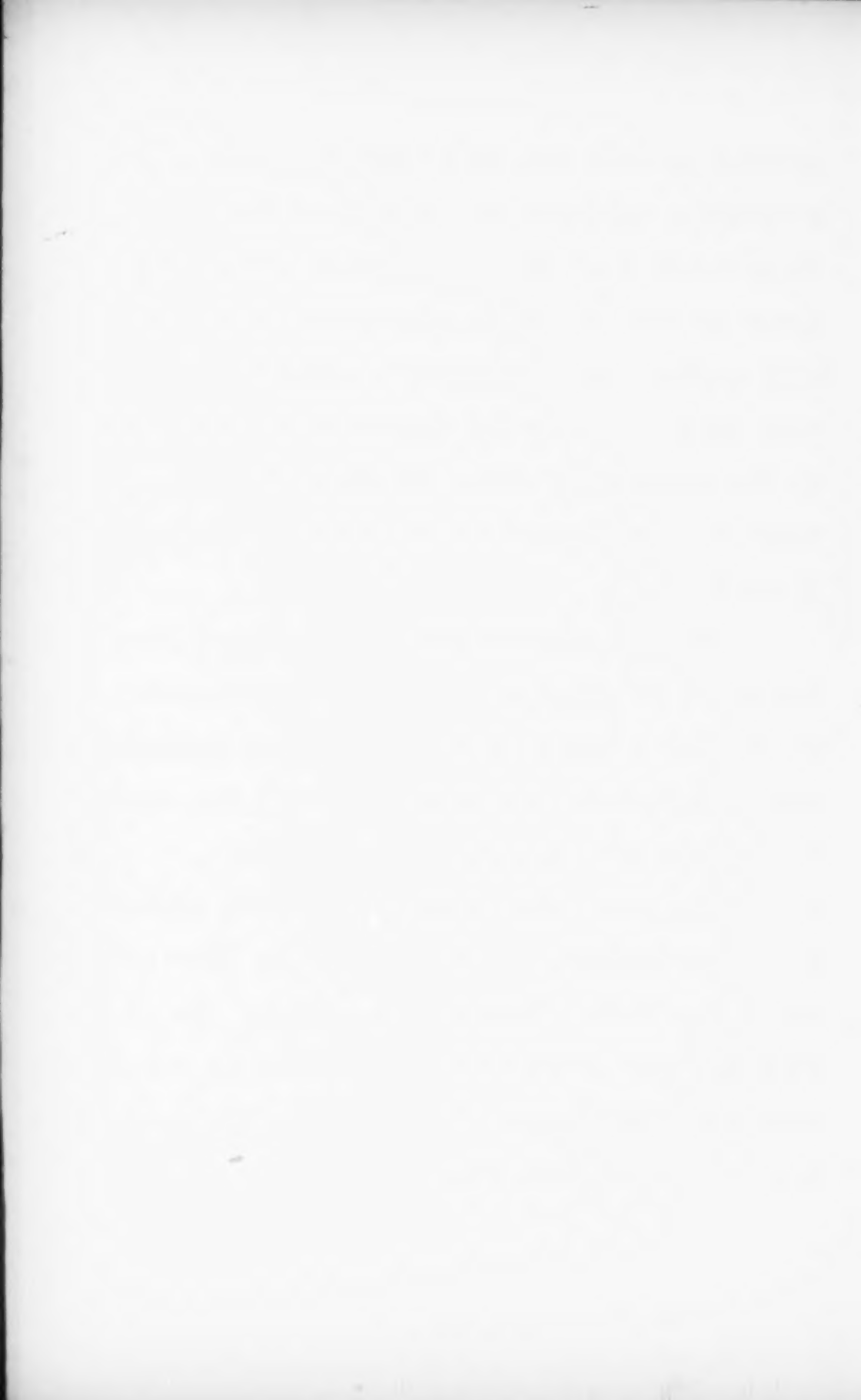
concerned that, where a government employee commits an intentional tort, his claim can be converted by clever drafting into a negligence claim against the government and the intentional tort exception can thus always be circumvented.⁸ See Johnson by Johnson v. United States, 788 F.2d 845 (2d Cir.), cert. denied, 107 S.Ct. 315 (1986); Miele by Miele v. United States, 800 F.2d 50 (2d Cir. 1986). This Court granted certiorari in Sheridan to resolve the question of whether there can be liability on the part of the government where the intentional tortfeasor is a government employee. The Court concluded that the intentional tortfeasor's receipt of a federal paycheck does not automatically bar a negligence claim against the government.

⁸ Petitioner suggests that the concern is unfounded. It may be possible to draft a complaint charging negligence, but claimant will still have to prove negligence to prevail.



Section 2680(h) can never apply if the government employee who committed the intentional tort was not "acting within the scope of his office or employment" for the FTCA waives the government's immunity from suit only for injuries caused by an "employee of the government while acting within the scope of his employment or office." 28 U.S.C. §1346(b).

Sheridan adopted and expanded upon the reasoning of Panella advanced by Petitioner throughout these proceedings. Under Sheridan, the intentional tort exception will not apply to bar the suit if, putting aside the exception, the intentionally tortious conduct would not subject the government to liability under the FTCA. That is the case if, as in Panella, the intentional tortfeasor is not a government employee. That is also the case if the government employee, as in Sheridan, was



off-duty when he acted. And it is also the case if, even though he was on duty, the intentionally tortious conduct was beyond the scope of his employment. The last is so for two reasons. First, the language of §1346(b) itself contains this "scope of employment" language. Second, under general tort principles wholly independent of the FTCA, an employer will not be liable for the torts of his employee if the employee is acting outside the scope of employment. See Riviello v. Waldron, 47 N.Y.2d 297, 418 N.Y.S.2d 300 (1979).

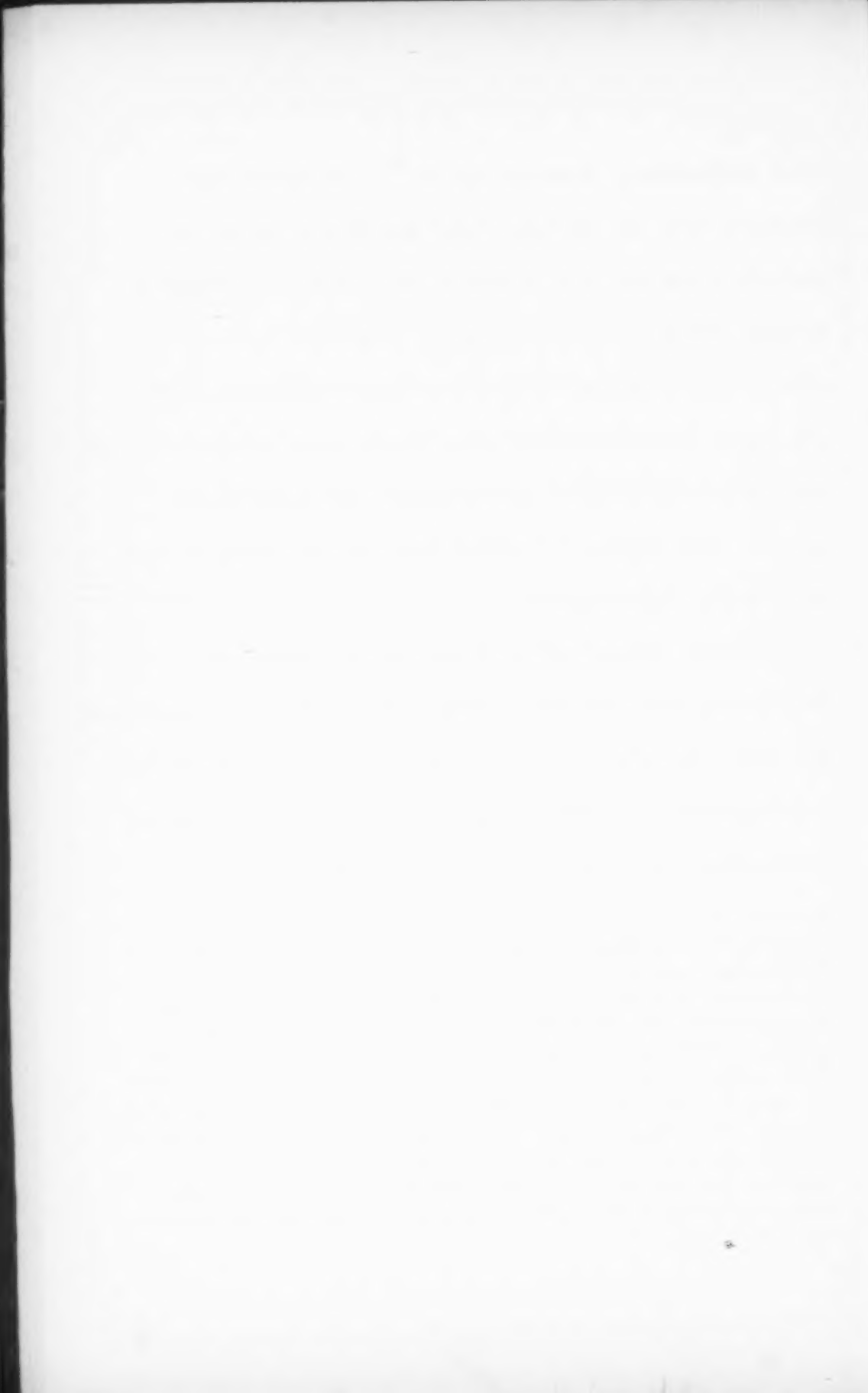
The Second Circuit did not apply these tests. Instead, it asked the question whether the intentional tort was "work related." That, however is not an appropriate stand-in for employer/employee; on-duty/off-duty; or within-the-scope of employment/outside-the-scope of employment because it does not make



the necessary distinction.⁹ It does not permit one to answer the question whether, putting aside the exception, the government would otherwise be liable for the tortious conduct. In other words, just because the conduct was work-related does not mean that it would subject the government to liability under the FTCA; it also has to be within the scope of employment.

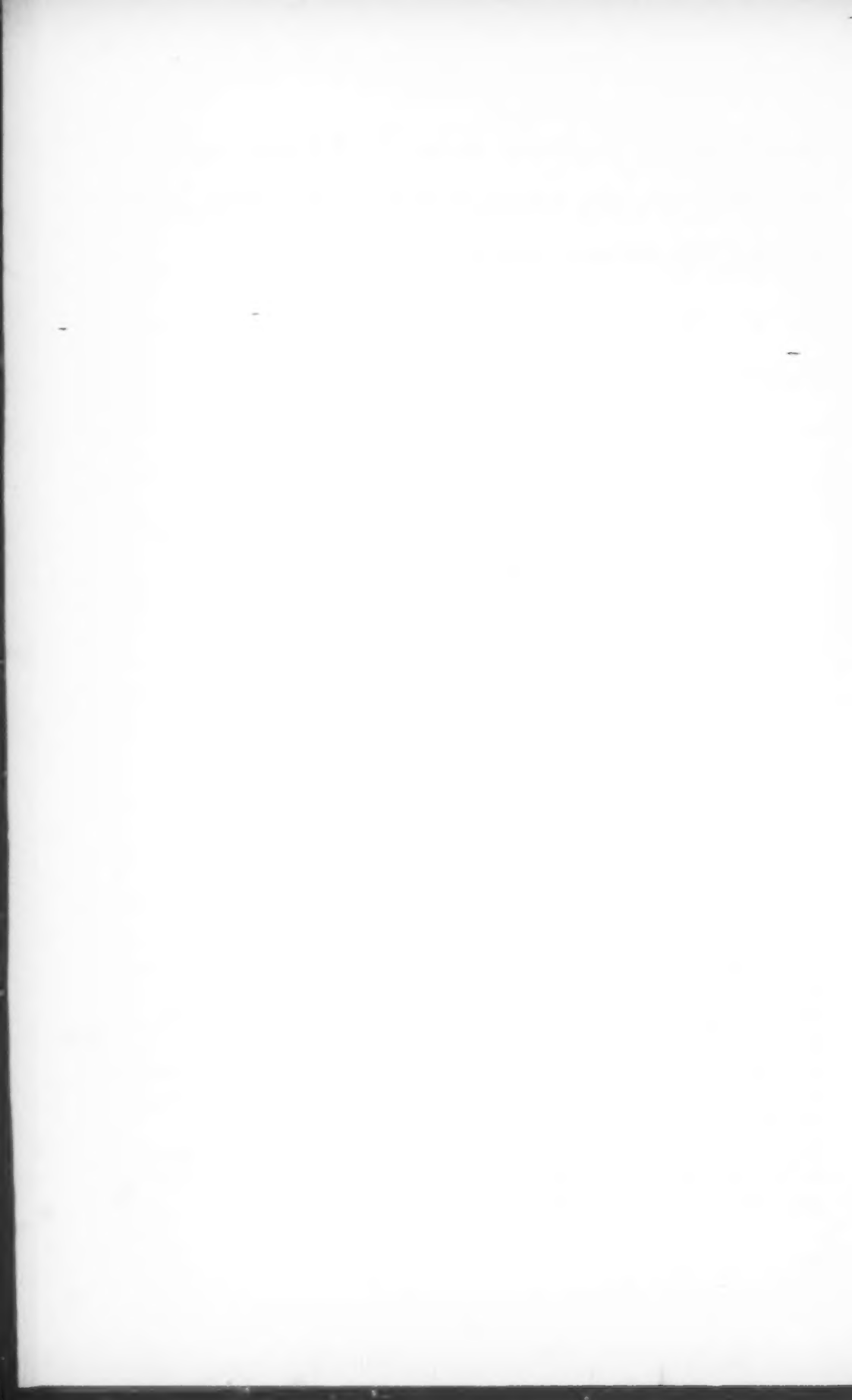
Petitioner maintains that, even if Weinberg was an employee, or is to be treated as one, he was acting beyond the scope of his employment in defaming and otherwise harming Guccione and that he is entitled to an

⁹ Whether an employee is acting within or outside the scope of his employment is relevant because where he is acting within, doctrines of respondeat superior come into play. Where he is acting outside the scope of his employment, respondeat superior can have no application. If he is acting outside the scope of employment, the employer will not be vicariously liable for his acts. Because there is no waiver of immunity as to such non-existent claims, there is no exception to be invoked.



opportunity to prove this.¹⁰ If his conduct was "beyond the scope," the intentional tort exception cannot apply.

¹⁰These, of course, are factual questions to be determined with reference to state law. See Doggett v. United States, 875 F.2d 684, 687 (9th Cir. 1989). Given that this was a sting operation, Weinberg may have been acting within the scope when he attempted to convince Guccione to engage in criminal acts. He surely was not, however, after his attempts had failed and he set out on a campaign to punish Guccione for his failure.



III. Even If The Second Circuit Were Right That Weinberg Should Be Treated As If He Were A Government Employee, The Court Has Answered The Question Left Open By Sheridan, And Answered That Question Incorrectly

The Sheridan Court expressly left open the question whether negligent hiring, negligent supervision or negligent training may ever provide the basis for liability under the FTCA for a foreseeable intentional tort by a government employee. If the Second Circuit is right that Weinberg's relationship with the government made him the equivalent of an employee, this case presents that question.

The Second Circuit has apparently answered the question: no. Petitioner maintains that it erred in so holding.

There is no reason to bar FTCA suits for negligent supervision, negligently hiring, or negligent training simply because the



negligent conduct permits the occurrence of an intentional tort by the negligently trained, supervised or hired government employee.

Negligence is the gravamen of such a complaint, and negligence will have to be proved in order for the claimant to recover. The FTCA was enacted to permit recovery for harms caused by the negligence of governmental employees. Negligent supervision cases thus fall squarely within the FTCA's waiver of sovereign immunity.

The Court below rejected this, not based on the language of the FTCA, nor on what Congress intended the FTCA to accomplish. Rather, it rejected it, it appears, because of its view that, putting aside the FTCA, no cause of action for negligence would or should lie.

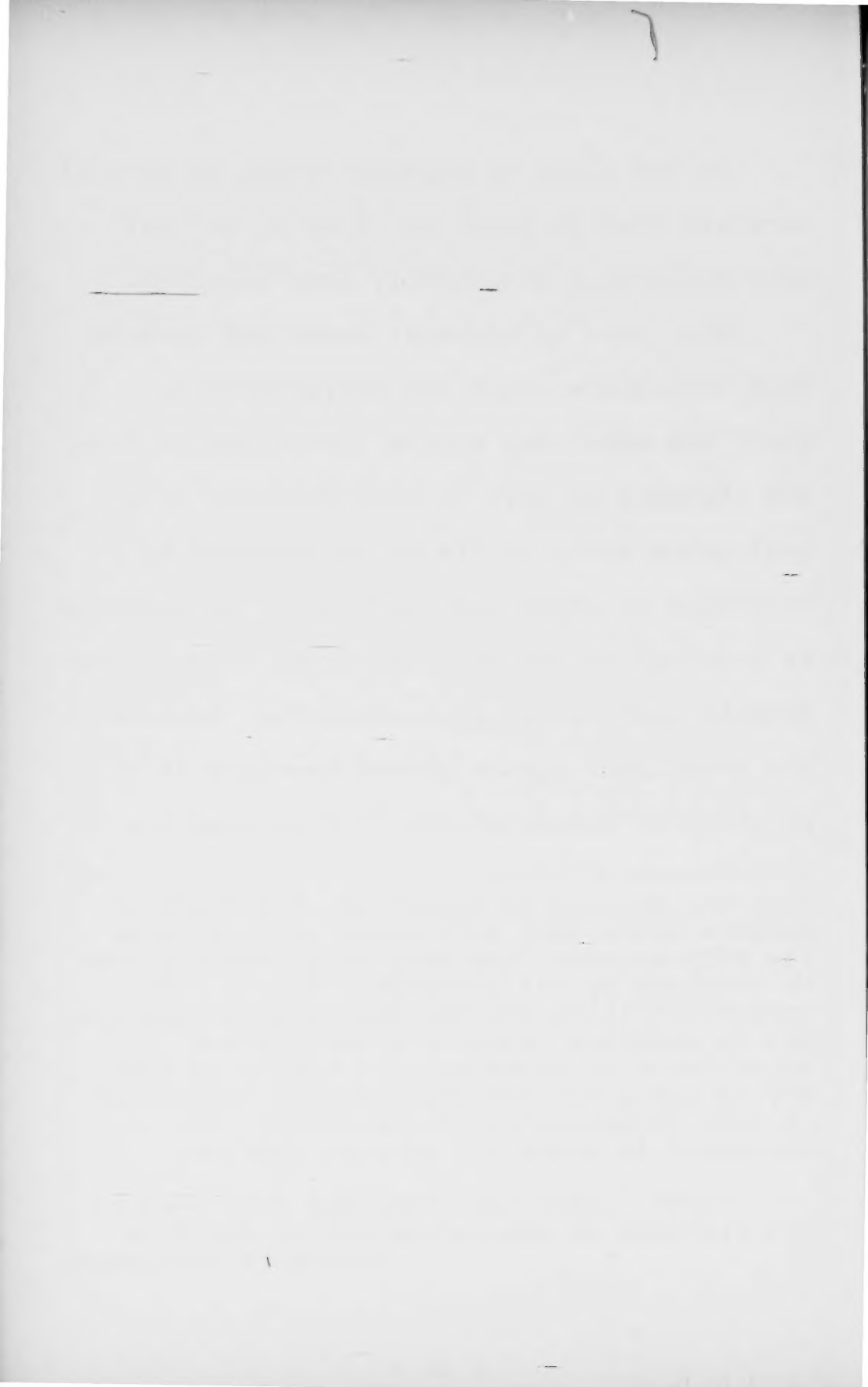


In the Court of Appeals' view, no duty of care was owed to Guccione; thus no duty of care could have negligently been breached.

The Court of Appeals' hostility towards this negligence claim was inappropriate. Under the statutory scheme, questions of duty and standard of care -- both elements of a negligence claim -- are to be answered by reference to state law, and cannot be resolved as a matter of law on this record. Petitioner submits that, under applicable law, because the government agents placed Guccione in a position of vulnerability,¹¹ they owed him a

¹¹In its opinion on rehearing, the Court of Appeals wrote that suit would not lie under the FTCA because "the only duty possibly owed to Guccione by the Government agents with responsibilities for the Abscam investigation was to exercise reasonable care in the supervision of those persons acting in some way to carry out the governmental objectives of that investigation." (A-20-21) The statement is wrong for several reasons.

First, under the FTCA, the duty owed to the claimant is determined not by the FTCA,
(footnote continued)



duty of care. He has alleged that they negligently breached it, and that this was the proximate cause of his injuries.¹² He has stated a valid cause of action.

(footnote continued from previous page) but by reference to state law. Petitioner maintains that under state law, the government agents in charge of the investigation owed him a duty of care and negligently breached that duty when, after allowing Weinberg to engage in a crusade against the plaintiff after having put him in a position to do so, it failed to exercise its duty to protect a foreseeable victim. The government knew that an operative had expressed his desire to punish Petitioner for his refusal to engage in criminal activity. By affirmatively placing the Petitioner in a foreseeably vulnerable position, and by intentionally hiding the government's role from Petitioner, the government assumed a duty to control its operative and to insure that its covert sting operation was carried out in a prudent and responsible manner. Cf. Kearney v. United States, 815 F.2d 535, 537 (9th Cir. 1987) ("The negligence of the government in this case was that of the government placing a predator in such loose custody that he could ... escape from custody and commit a murder"); Thigpen v. United States, 800 F.2d 393, 399, n.7 (4th Cir. 1986) (Murnaghan, J., dissenting) ("A defendant may also assume an affirmative duty to protect the plaintiff by entering into a special relationship with the plaintiff's assailant ... [such as] where the

(footnote continued)



IV. The Decision Of The Second Circuit Conflicts With Decisions Of The Ninth Circuit

As demonstrated above, the Second Circuit has, implicitly, decided the issue specifically left open in Sheridan. It has apparently ruled that the United States may not be held liable under the FTCA for negligent supervision where the person

(footnote continued from previous page)
assailant is a violent patient ... the hospital is held to assume a affirmative duty to protect any person who might foreseeably become a victim of the patient's attacks").

Second, a governmental employee's breach of a duty of care, through negligence, is precisely the kind of claim which is actionable under the FTCA.

¹²The Second Circuit's hostility to Guccione's claim may also rest on the notion that whatever the supervisors' negligence may have been, it was not the proximate cause of Guccione's injuries; rather, Weinberg's acts were intervening and superseding causes. These questions, too, must be answered with reference to state law. They cannot be resolved on this record as a matter of federal law.



negligently supervised commits on intentional tort. This ruling conflicts with the rule which exists in the Ninth Circuit.

In a series of cases, the Ninth Circuit has held that §2680(h) is not a bar to a suit against the United States based on the negligent supervision of an employee that proximately results in an intentional tort. See, Kearney v. United States, 815 F.2d 535, 538 (9th Cir. 1987); Bennett v. United States, 803 F.2d 1502, 1503-04 (9th Cir. 1986); Knappick v. United States, No. 88-2462, 875 F.2d 318 (Table) (9th Cir. May 18, 1989) (unpublished memorandum opinion available on Westlaw).

In Kearney, complainant sued under the FTCA for the wrongful death of his wife, the victim of an assault, battery, rape and murder at the hands of an army private who had escaped from confinement due to allegedly



negligent supervision by other military personnel. The district court granted summary judgment to the government, applying the intentional tort exception to the FTCA. The Court of Appeals reversed, carefully explaining its reasoning.

The difficult question in this case is whether Congress intended by the assault and battery exception to bar this kind of action against the federal government when the alleged harm resulted from the government's own negligence in failing to supervise properly a prisoner confined to barracks. As we indicated in Bennett, Shearer gives no definitive answer, and the historical evidence of Congressional intent is not very clear. 803 F.2d 1504. The purpose of the Federal Tort Claims Act is to provide a remedy to citizens injured by governmental negligence in circumstances in which the same act of negligence would impose liability under state law, but for governmental immunity. On the other hand, it is clear that with federal employees numbering in the millions, Congress did not want the treasury to be the ultimate



deep pocket for every plaintiff injured in an altercation with a federal employee....

The courts construing §2680(h) have given effect to these aims by interpreting the subsection as shielding the government from respondeat superior liability for batteries by employees, not from the consequences of its own negligence. See Bennett, 803 F.2d at 1503-04. Thus, courts have drawn a line that preserves government immunity from liability for those batteries committed by government employees including members of the armed forces, guards, and police officers, while imposing liability upon the government for those batteries committed by persons under government control who are negligently supervised or controlled, such as patients, see, e.g., Jablonski, 712 F.2d 391; Underwood v. United States, 356 F.2d 92 (5th Cir. 1966,) prisoners, see, e.g., United States v. Muniz, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963); Rogers v. United States, 397 F.2d 12 (4th Cir. 1986), and, in rare cases, employees known to be dangerous. See Bennett, 803 F.2d 1502; Gibson v. United States, 457 F.2d 1391 (3d Cir. 1971). We see no principled



reason to permit recovery when the government has been negligent in supervising nonemployees, but to deny recovery, as the district court did in this case, when the government has been negligent in supervising an employee. Bennett, 803 F.2d at 1504.

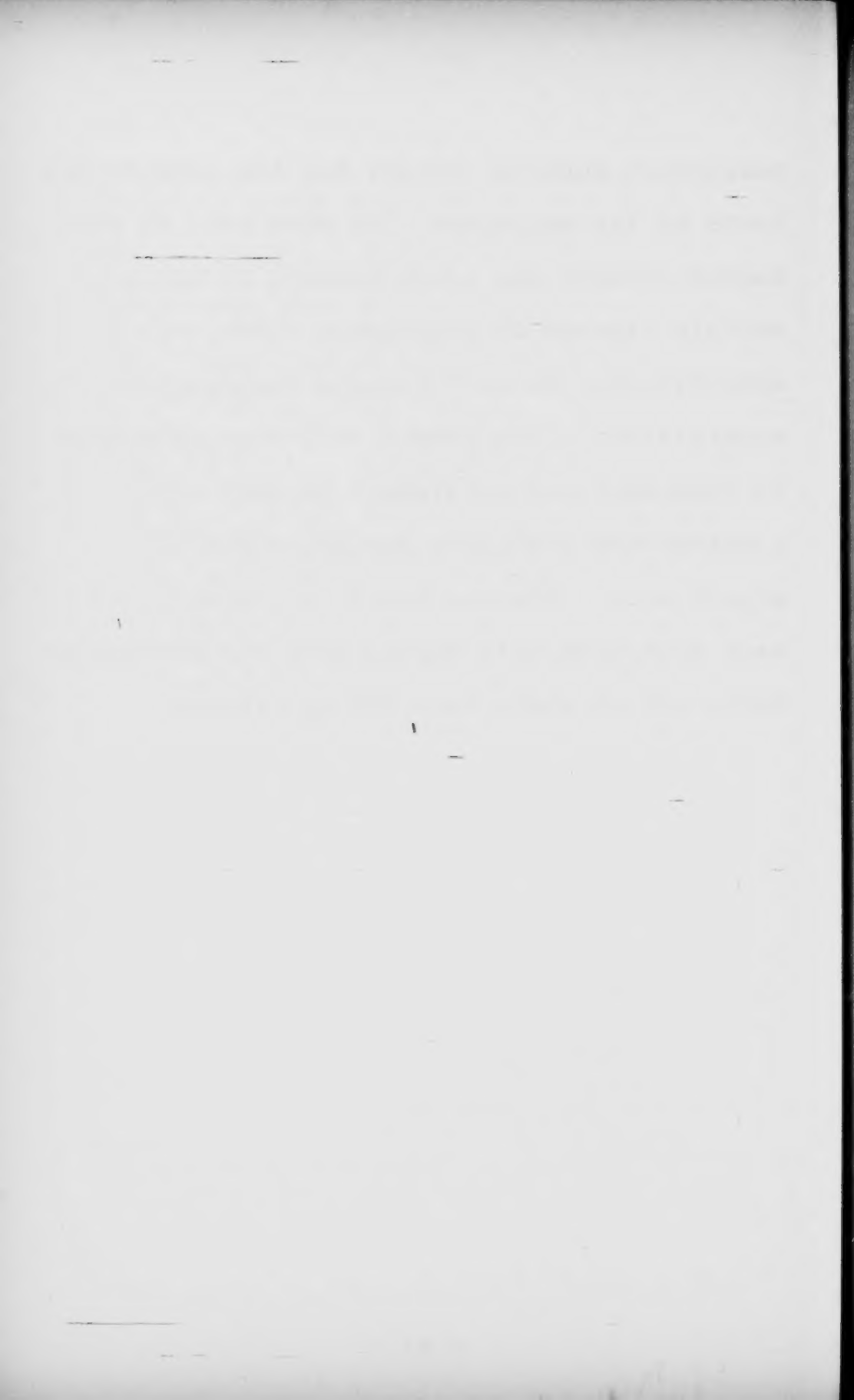
In the case at bar, the murder probably included an assault and battery. But the liability of the government is not predicated on respondeat superior liability for the soldier's murder of Kearney, but on the negligence of the government itself. The negligence in this case was that of the government in placing a known predator in such loose custody that he could, with the aid of a few dollars in bribes and two wholly incompetent, if not corrupt, government employees, escape from custody and commit a murder while awaiting trial for other violent crimes.

815 F.2d 536-37.

Petitioner suggests that the Ninth Circuit has construed the intentional tort exception correctly: the statutory exception shields the government from suit on a



respondeat superior theory for the intentional torts of its employees. It does not, as the Second Circuit has held, operate to bar certain classes of negligence cases, specifically, those involving negligent supervision. The intentional tort exception is fundamentally irrelevant to the government's liability for negligent supervision. Whether there is liability in each such case will depend upon the particular facts and on state law, not on §2680(h).



CONCLUSION

These issues have long plagued the courts, and will continue to do so until resolved by this Court. This case presents an appropriate vehicle for their resolution. For these reasons, Petitioner respectfully prays that the writ of certiorari be granted.

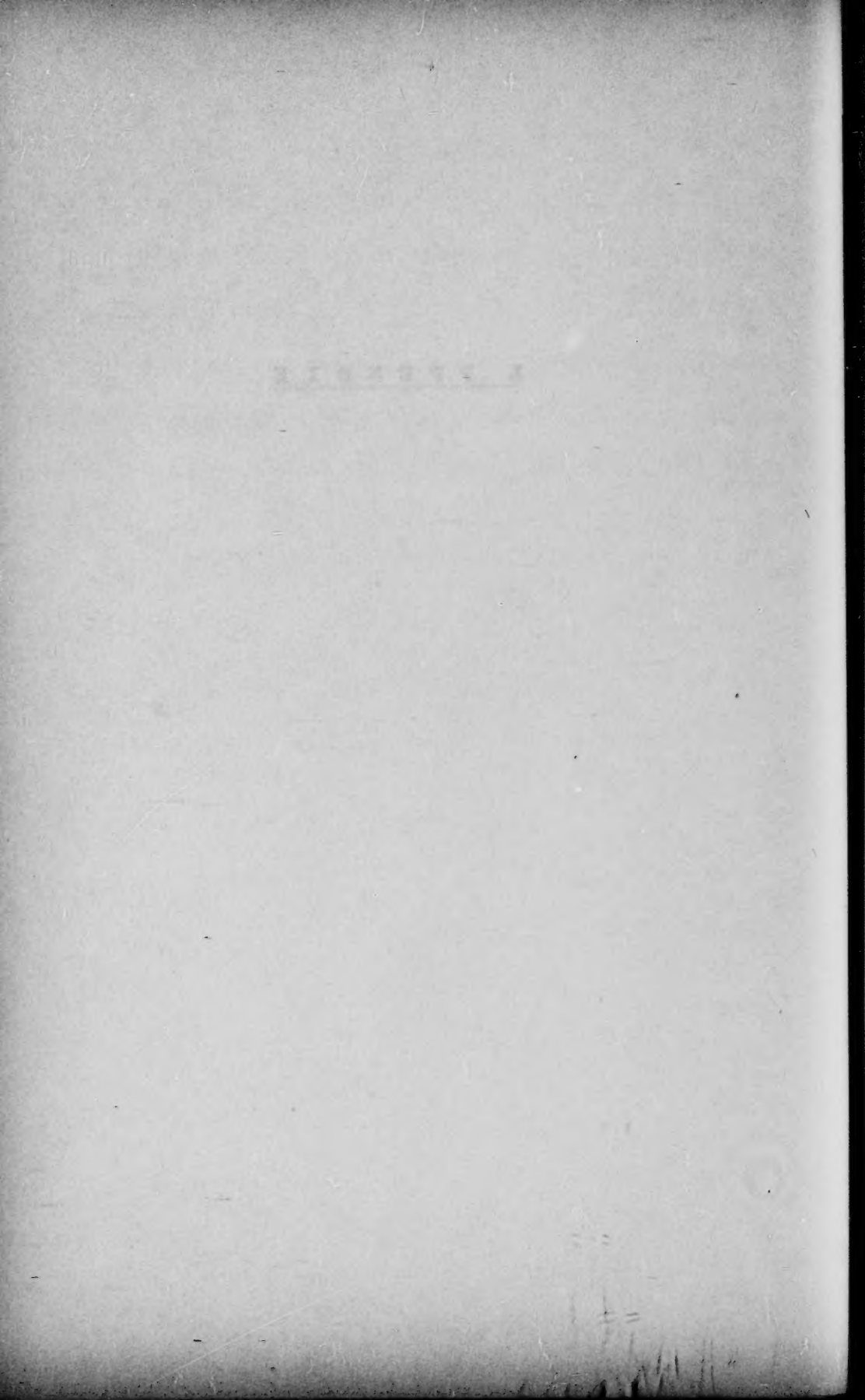
Respectfully submitted,

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Victoria B. Eiger
Of Counsel

Dated: October 3, 1989

A P P E N D I X



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the sixth day of July, one thousand nine hundred and eighty-nine.

ROBERT C. GUCCIONE,
Plaintiff-Appellant, Docket No. 87-6207
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

UNITED STATES COURT OF APPEALS
Filed
Jul -6 1988
Elaine B. Goldsmith, Clerk
SECOND CIRCUIT

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiff-appellant Robert C. Guccione;

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.



It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 662—August Term 1987

Argued: January 15, 1988

Decided: May 26, 1988

Docket No. 87-6207

ROBERT C. GUCCIONE,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

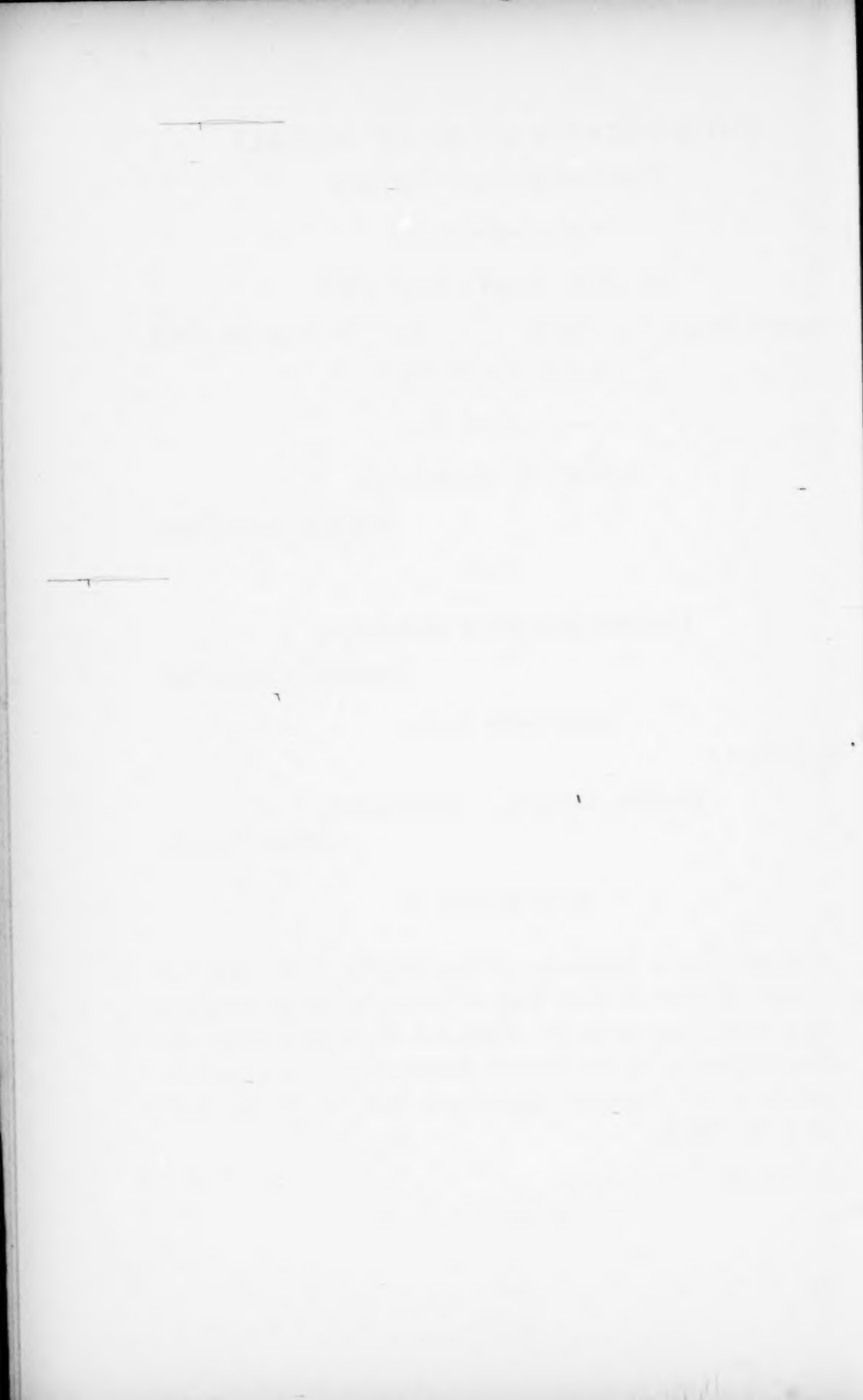
B e f o r e :

OAKES, NEWMAN, and MINER,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York (Constance Baker Motley, Judge) dismissing plaintiff's claim for damages in a suit alleging negligence by the Federal Bureau of Investigation in conducting its Abscam operation. 670 F. Supp. 527 (S.D.N.Y. 1987).

Affirmed.

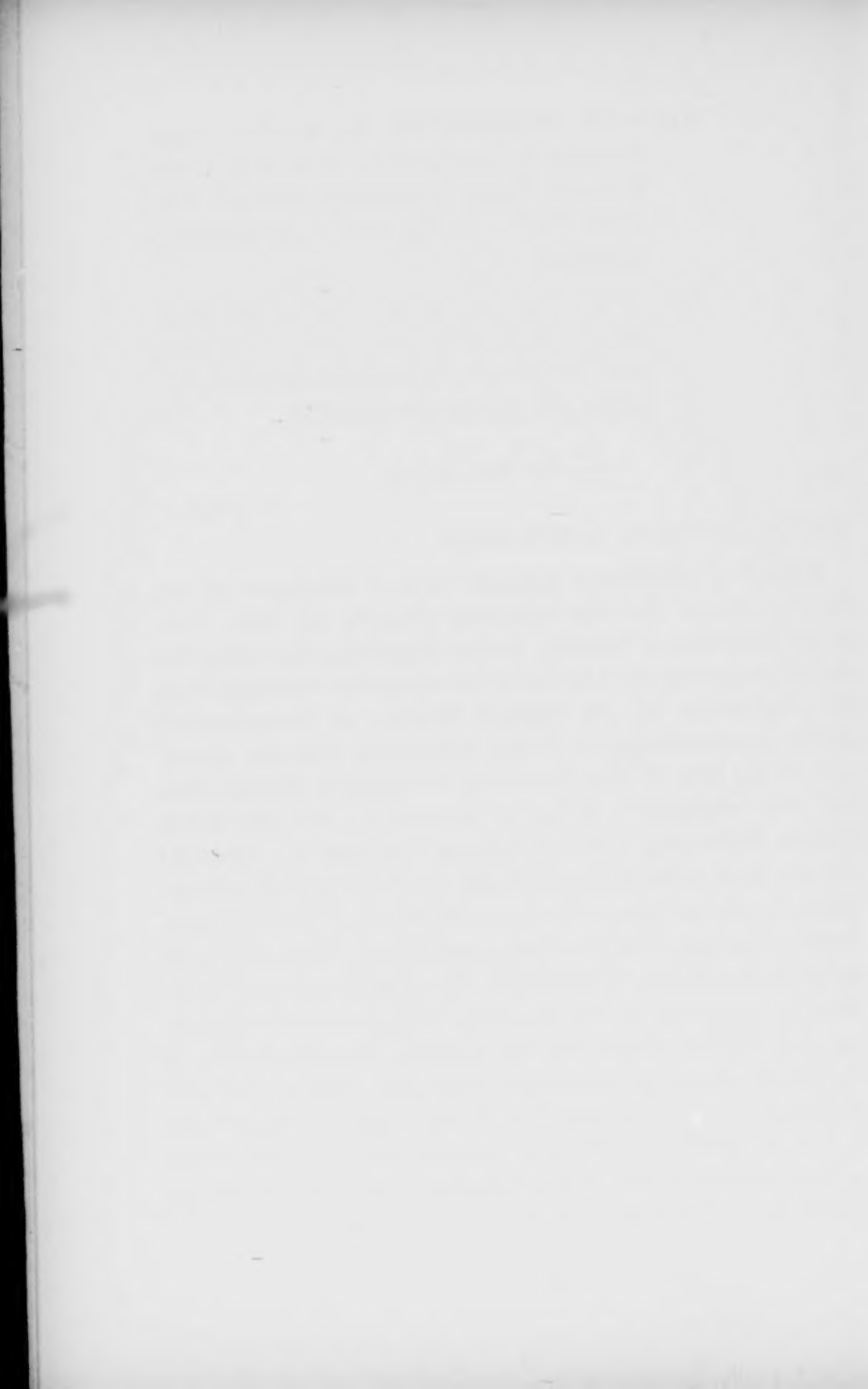


ALAN M. DERSHOWITZ, Cambridge, Mass.
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York, N.Y., on the brief), *for plaintiff-*
appellant.

DAVID R. LEWIS, Asst. U.S. Atty., (Rudolph
W. Giuliani, U.S. Atty., Nancy Kilson,
Asst. U.S. Atty., New York, N.Y., on the
brief), *for defendant-appellee.*

JON O. NEWMAN, *Circuit Judge:*

Robert C. Guccione appeals from a judgment of the District Court for the Southern District of New York (Constance Baker Motley, Judge) dismissing his claim for damages against the United States allegedly resulting from the negligence of the Federal Bureau of Investigation (FBI) in conducting its highly publicized Abscam operation in the late 1970's. Guccione's complaint charges that the FBI negligently failed to prevent a paid operative, Melvin Weinberg, from defaming Guccione to potential lenders and otherwise tortiously interfering with his attempt to secure financing for completion of a casino and hotel project in Atlantic City, New Jersey. The complaint seeks \$400 million in damages. The District Court, in an opinion reported at 670 F. Supp. 527, entered judgment for the United States on the ground that the action is barred by sovereign immunity under the "intentional tort exception" to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(h) (1982), and alternatively that the action is time-barred under the applicable two-year statute of limitations. We affirm on the immunity ground.

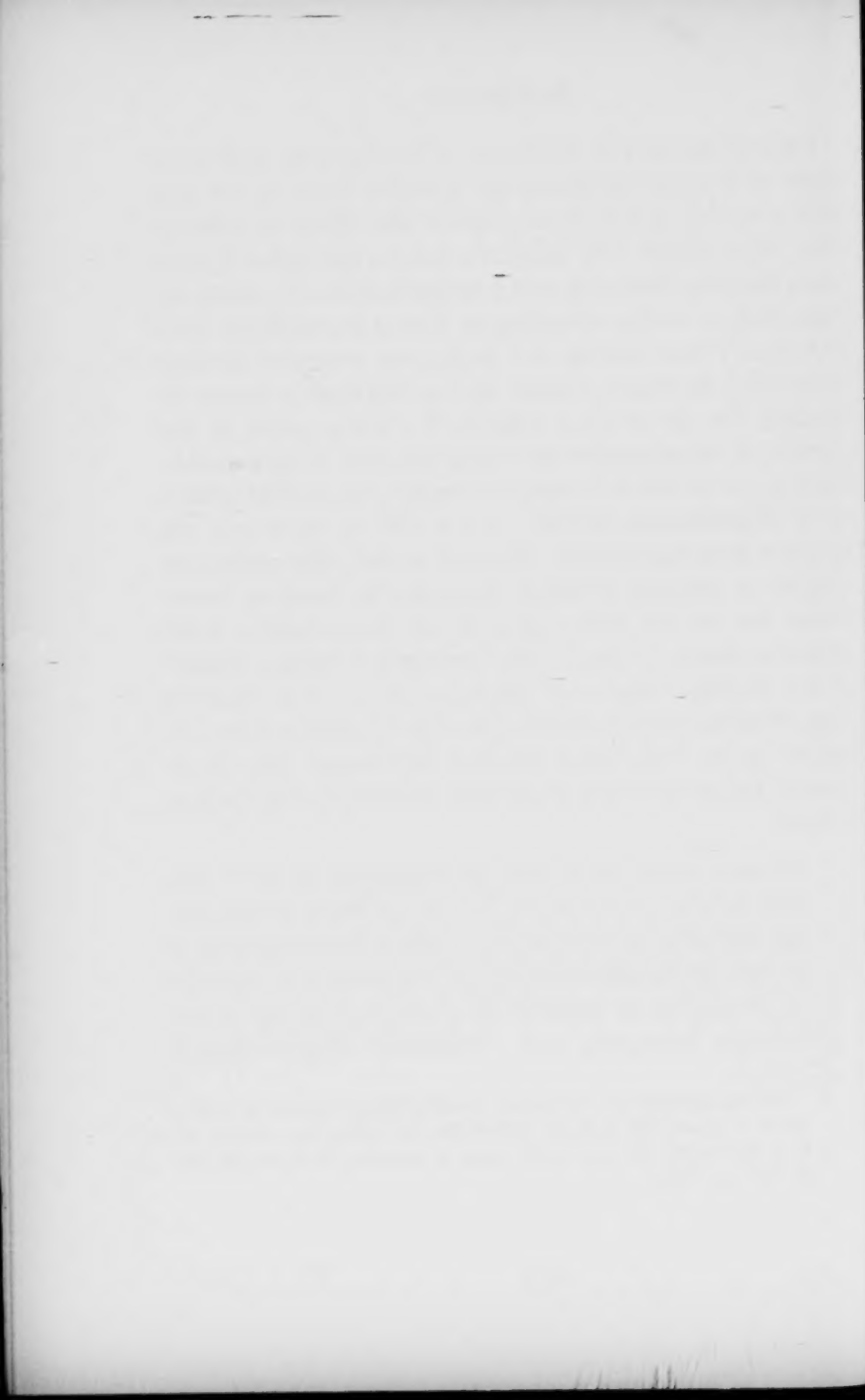


Background

Plaintiff-appellant Guccione, a businessman and publisher of Penthouse Magazine, initiated plans in the late 1970's to build a Penthouse Casino and Hotel in Atlantic City, New Jersey. The project's success depended in part upon securing financing and a casino license. Guccione alleges that an entity operating as Abdul Enterprises, Ltd. ("Abdul") was among the numerous potential lenders with which he was in contact during this time to secure financing for his project. Melvin Weinberg acted as the agent and representative of Abdul for these purposes. Abdul was not in fact a prospective lender, but an FBI undercover organization created by the FBI to carry out the Abscam sting operations.¹ Through Abdul, FBI operatives sought to uncover criminal activities by holding themselves out as the representatives of two wealthy Arab sheiks in search of American "investment opportunities" in the nascent casino and gambling industry in Atlantic City. Weinberg worked undercover in the Abscam investigation as an FBI operative and informant. His background and general role in Abscam have been described as follows:

Abscam began after Melvin Weinberg in 1977 was convicted in the Western District of Pennsylvania on his plea of guilty to fraud. In return for a sentence of probation Weinberg agreed to cooperate with the FBI in setting up an undercover operation similar to the London Investors, Ltd. "business" that Weinberg

1 The background of the Abscam investigation is detailed in *United States v. Myers*, 692 F.2d 823, 829-34 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983). See also *United States v. Silvestri*, 719 F.2d 577, 579-80 (2d Cir. 1983).

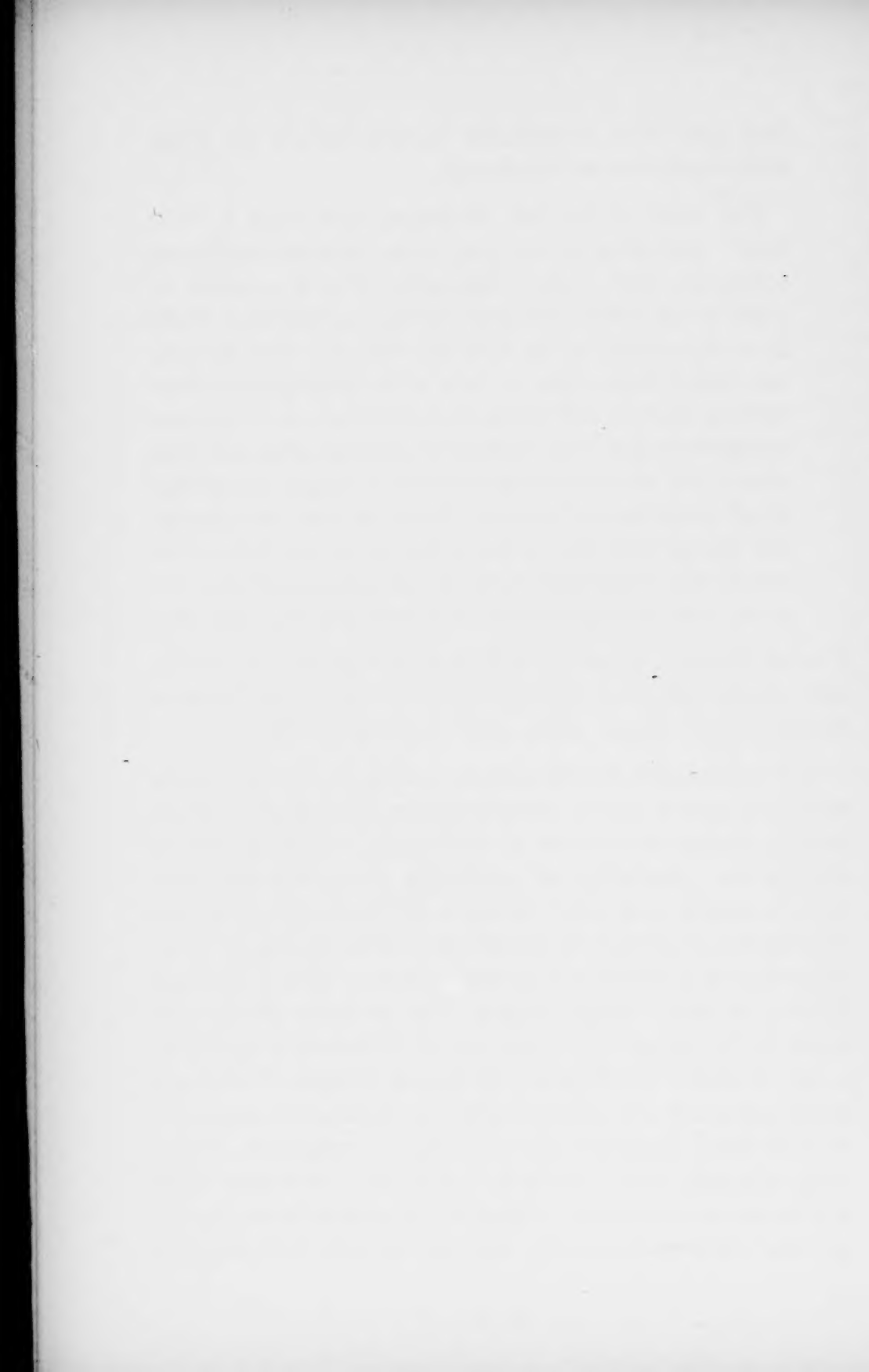


had used with remarkable success before his arrest and conviction in Pittsburgh.

For most of his life Weinberg had been a "con man" operating in the gray area between legitimate enterprise and crude criminality. For a number of years in the 1960s and early 1970s, he had been listed as an informant by the FBI and had provided his contact agent from time to time with intelligence about various known and suspected criminals and criminal activities in the New York metropolitan area and elsewhere, for which he had received in return occasional small payments of money. When he was arrested on the charge that led to his guilty plea, his informant status was cancelled, later to be reinstated after his guilty plea and agreement to cooperate with the FBI.

United States v. Myers, 692 F.2d 823, 829 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983) (quoting *United States v. Myers*, 527 F. Supp. 1206, 1209 (E.D.N.Y. 1981)).

It is undisputed that Weinberg, acting as Abdul's representative, met or spoke with Guccione on at least three occasions during the course of the Abscam investigation to discuss the possibility of providing financing for Guccione's casino and hotel project. In these conversations Weinberg unsuccessfully sought to induce Guccione's participation in a scheme to secure a casino license through bribery or other illegal means. The tortious conduct alleged in the complaint arises out of Weinberg's initial attempt to create conditions that would compel Guccione's participation in the scheme, and his subsequent campaign to "punish" Guccione for refusing to cooperate. Weinberg allegedly told Guccione's business associates false stories about Guccione's ailing financial condition, his organized crime connections, and his unlikely prospects for



receiving a casino license. When Weinberg recognized that Guccione would not join the illegal scheme, he told a Guccione business associate: "The best way to punish him [Guccione], he doesn't get the [casino project] built—that punishes more than anything else." Weinberg allegedly carried out this vindictive campaign by further maligning Guccione in statements to prospective lenders, influential politicians, and other business associates. The complaint claims that as a direct result of Weinberg's defamation and interference with Guccione's business interests, Guccione was unable to secure the necessary financing for the project between 1979 and 1983, when an exculpatory Senate Report² was published and disseminated to lenders.

The District Court dismissed Guccione's complaint for lack of subject matter jurisdiction because of sovereign immunity. The Court held that Guccione's claims against the United States, though pleaded in negligence, were claims "arising out of" the alleged intentional torts of the FBI operative, Weinberg, and were therefore barred by the "intentional tort" exception to the general waiver of sovereign immunity contained in the FTCA, 28 U.S.C. §§ 1346(b) (general waiver), 2680(h) (intentional tort exception) (1982). Alternatively, the District Judge granted the Government's motion for summary judgment on the ground that Guccione had failed to bring his action within the applicable two-year limitations period. Judge Motley found that plaintiff's claim was not first presented until November 28, 1984, or at the earliest July 18, 1984, but had accrued no later than March 1982. Judge Motley

2 Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice to the United States Senate ("the Senate Report"), S. Rep. No. 682, 97th Cong., 2d Sess. (1982). Part F of the Senate Report, entitled "Allegations Regarding the Investigation of Bob Guccione," provides much of the factual basis for the complaint.



rejected Guccione's contention that he did not have notice of the defamatory conduct underlying his claim until the release of the Senate Report, *supra* n.2.

Discussion

Under the FTCA, the Government has waived immunity from suit for claims of property damage or personal injury caused by the "negligent or wrongful act or omission" of its employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Section 2680(h) of the FTCA, the so-called intentional tort exception, excludes from this limited waiver of sovereign immunity "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."³ The task of maintaining the FTCA's jurisdictional boundary has been more difficult in practice than is suggested by the statute's facially neat distinction between claims sounding in negligence and those "arising out of" the enumerated intentional torts. Difficulty has arisen primarily in situations in which intentionally inflicted harm may have occurred in significant part because of the negligence of Government personnel. Appellant contends that this is such a case, and that his "negligent supervision" claim is actionable notwithstanding

3 In 1974, Congress amended FTCA coverage to include assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution by federal officials empowered to make searches, seizures, or arrests. Act of Mar. 22, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (amending 28 U.S.C. § 2680(h)). Appellant does not contend that this exception to the section 2680(h) exception applies in the present case.



ing the apparent applicability of section 2680(h) to Weinberg's conduct.

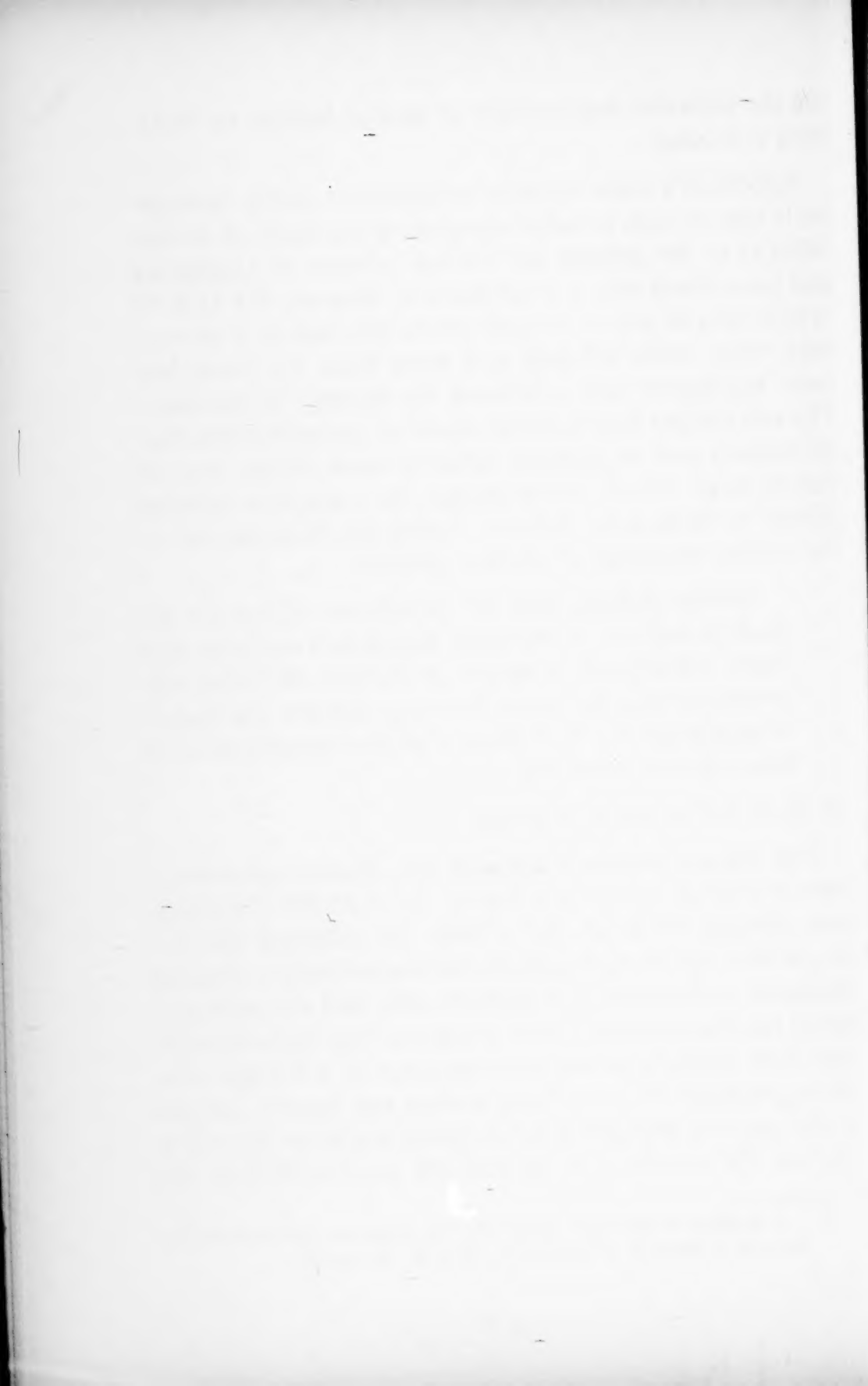
Appellant's claim initially encounters a rather inhospitable line of cases broadly interpreting the scope of section 2680(h) in the context of "mixed" claims of negligence and intentional tort. *United States v. Shearer*, 473 U.S. 52 (1985), was an action brought by the survivor of a serviceman who, while off duty and away from his base, had been kidnapped and murdered by another serviceman. The suit alleged that the Army knew of the assailant's dangerousness and negligently failed to warn others that he was at large. Chief Justice Burger, in a plurality opinion joined by three other Justices, found the claim barred by the express language of section 2680(h):

Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a Government employee.

Id. at 55 (emphasis in original).⁴

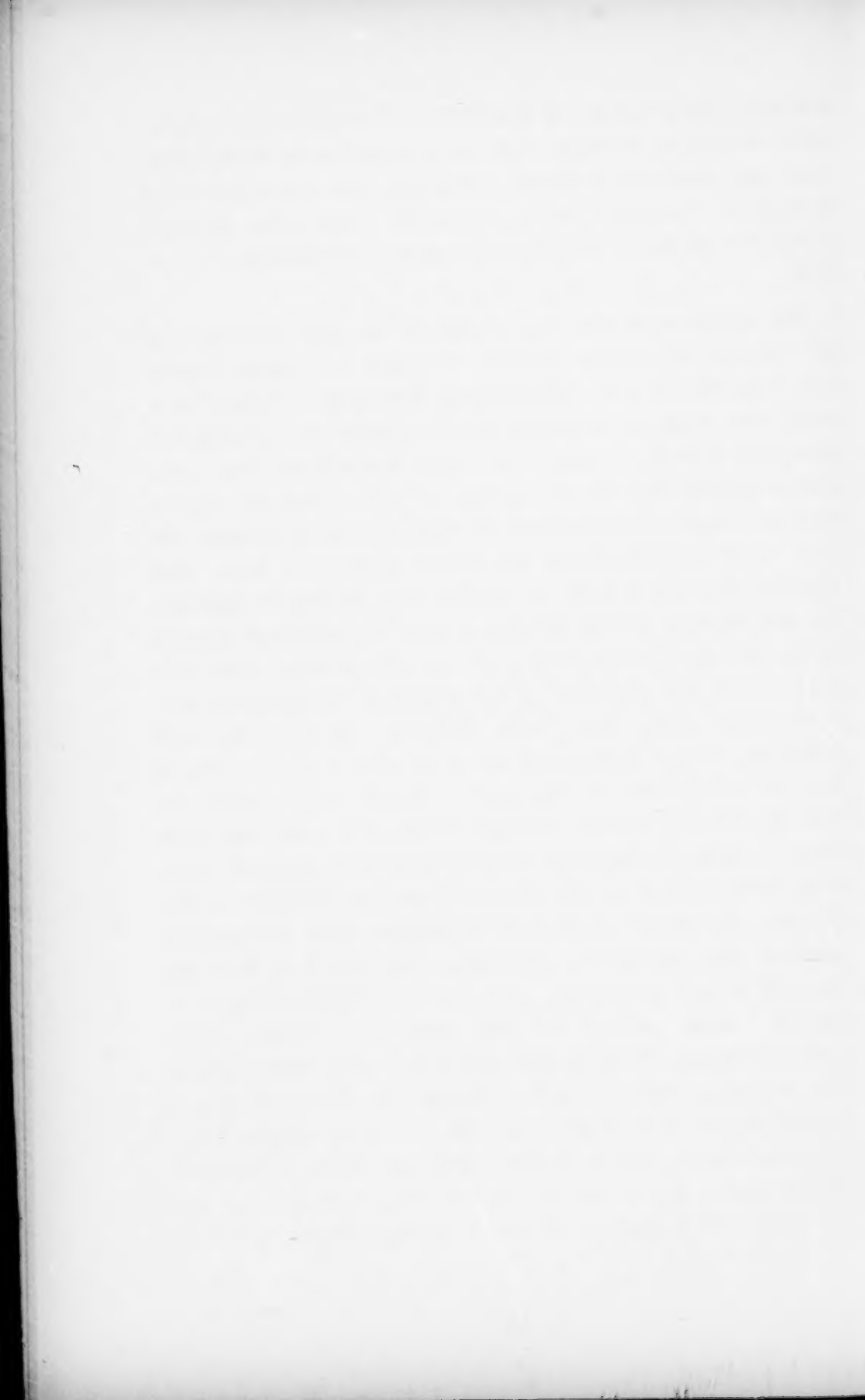
This Court expressly adopted the *Shearer* plurality's view in *Johnson v. United States*, 788 F.2d 845 (2d Cir.), *cert. denied*, 107 S. Ct. 315 (1986). We affirmed the dismissal of a suit brought against the United States, alleging negligent supervision of a postman who had sexually molested the child plaintiff. Indicating our "agree[ment] with the Chief Justice that the plain language of § 2680(h) prohibits claimants from clothing assault and battery actions in the garb of negligence by claiming negligent failure to prevent the attack," *id.* at 850, we concluded that the

⁴ A majority of the Court agreed that the claim was barred under the doctrine of *Feres v. United States*, 340 U.S. 135 (1950).



plaintiff could not avoid the FTCA's jurisdictional restrictions simply by alleging that the United States Postal Service had negligently hired, assigned, and supervised the assaultive postman "with notice or knowledge of [his] criminal and perverted propensities and tendencies," *id.* at 854.

We reaffirmed this interpretation of the "arising out of" phrase of section 2680(h) in *Miele v. United States*, 800 F.2d 50 (2d Cir. 1986), a suit brought on behalf of a child who had been permanently blinded and disfigured when an AWOL soldier threw acid in his face. The complaint alleged that the Army was on notice that the soldier had previously displayed an obsessive hostility toward the child and presented an imminent threat to him, and claimed that the Army was negligent in failing to appreciate the danger posed by the soldier's disturbed mental state, failing to adequately supervise the soldier, and failing to warn the plaintiff of the soldier's delusionary preoccupation with the child. Relying on *Shearer* and *Johnson*, we affirmed dismissal of the claim on the ground that the allegation of negligence merely re-presented the assault claim in artfully redrawn form. We note that most other circuits considering the question have adopted similarly broad views of the scope of section 2680(h) in the context of mixed claims of negligent and intentional conduct. See *Sheridan v. United States*, 823 F.2d 820 (4th Cir. 1987), *cert. granted*, 108 S. Ct. 747 (1988); *Thigpen v. United States*, 800 F.2d 393 (4th Cir. 1986); *Hoot v. United States*, 790 F.2d 836 (10th Cir. 1986); *Satterfield v. United States*, 788 F.2d 395, 399 (6th Cir. 1986); *Garcia v. United States*, 776 F.2d 116, 118 (5th Cir. 1985); *Wine v. United States*, 705 F.2d 366 (10th Cir. 1983); *Naisbitt v. United States*, 611 F.2d 1350 (10th Cir.), *cert. denied*, 449 U.S. 885 (1980). But see *Morrill v. United States*, 821 F.2d



1426 (9th Cir. 1987); *Kearney v. United States*, 815 F.2d 535 (9th Cir. 1987); *Bennett v. United States*, 803 F.2d 1502 (9th Cir. 1986).

Appellant advances two theories to distinguish the present case from *Shearer*, *Johnson*, and *Miele*. His primary contention is that under case law interpreting section 2680(h), particularly *Panella v. United States*, 216 F.2d 622 (2d Cir. 1954), the statute's jurisdictional bar does not apply to claims that arise out of the intentional torts of non-governmental employees. He argues that the intentional tort exception is inapplicable in the present case because Weinberg qualifies as a non-governmental employee under the *Panella* rule, or at least that the nature of Weinberg's relationship to the Government raises a substantial question of fact unsuited for disposition at this stage of the proceedings. Alternatively, appellant contends that Weinberg's intentional wrongdoing is separate and distinct from the gravamen of the complaint, which is that the FBI, by "failing to exercise requisite care in selecting, training, instructing, supervising and controlling Weinberg," Brief of Appellant at 27 n.11, breached an "independent affirmative duty" owed to appellant himself: "There can be little question that by knowingly allowing Weinberg to engage in a crusade against Guccione, the government failed to exercise its duty to protect a foreseeable victim," *id.* at 25. Neither argument withstands scrutiny.

The Panella Exception. In *Panella*, *supra*, we held that a patient/inmate who had been assaulted by a fellow inmate at a federal prison hospital was not barred from bringing suit against the United States for failure adequately to supervise and protect those confined there. Appellant misreads *Panella* to establish a jurisdictional test



turning upon the technical nuances of the intentional tortfeasor's employment relationship to the Government. Though a rigid employee/non-employee jurisdictional rule could be extracted from the often abbreviated references to *Panella* in subsequent case law,⁵ shorthand references should not be permitted to obscure the decision's precise holding.

In *Panella*, the fact that the assailant was not a federal employee warranted emphasis only because it served as a useful way to demonstrate that, despite the claim's mixed allegations of both negligence and intentional conduct, the plaintiff's "negligence action is not merely an alternative form of remedy to an action for assault but negligence is rather the essence of the plaintiff's claim," *Panella v. United States*, *supra*, 216 F.2d at 624. The absence of any employment or work-related relationship between the assailant and the federal government provided a simple, unequivocal assurance that the negligent supervision claim really was the "essence" of the claim and not a surreptitious way of seeking to hold the United States liable for the intentional torts of those in some way carrying out the Government's business. *Panella* thus established a clear rule of easy application: where the intentional tortfeasor is *in no sense* carrying out the Government's business, the

5 See *United States v. Shearer*, *supra*, 473 U.S. at 56 ("Today's result is not inconsistent with the line of cases holding that the Government may be held liable for negligently failing to prevent the intentional torts of a non-employee under its supervision."); *Thigpen v. United States*, *supra*, 800 F.2d at 394 n.3; *Johnson v. United States*, *supra*, 788 F.2d at 851; *Jablonski v. United States*, 712 F.2d 391, 395 (9th Cir. 1983); *Naisbitt v. United States*, *supra*, 611 F.2d at 1355; *Underwood v. United States*, 356 F.2d 92, 100 (5th Cir. 1966); *Muniz v. United States*, 305 F.2d 285, 287 (2d Cir. 1962), *aff'd*, 374 U.S. 150 (1963); *Hughes v. Sullivan*, 514 F. Supp. 667, 669-70 (E.D. Va. 1980), *aff'd*, 662 F.2d 219 (4th Cir. 1981) (*per curiam*); *Pennington v. United States*, 406 F. Supp. 850, 851-52 (E.D.N.Y. 1976).



claim against the United States for negligent supervision of the assailant does not "arise out of" an intentional tort within the meaning of section 2680(h).⁶

Thus understood, *Panella* does not permit a negligent supervision claim to succeed whenever the intentional tortfeasor is not technically an "employee" of the United States but nonetheless advancing the Government's interests in some more attenuated employment relationship or acting as an independent contractor.⁸ A jurisdictional rule based upon such technicalities, as urged by appellant, is not suggested by either the language of section 2680(h) or its underlying purposes. As we observed in *Johnson and Miele*, the "arising out of" language is broad and must not be circumvented by techniques of artful pleading. Likewise, the legislative history, though meager, see *Johnson v. United States*, *supra*, 788 F.2d at 852-53 & n.5, car-

6 Obviously, the negligence claim in *Panella* had to be rooted in *some* relationship between the Government and either the assailant or the victim. See *infra* n.9. The critical point here is that the relationship must be something other than the Government's purported duty to supervise or control those carrying out its business.

7 The FTCA defines "employee of the government" to include "officers or employees of any federal agency . . . and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. § 2671 (1982). See *Witt v. United States*, 462 F.2d 1261, 1263-64 (2d Cir. 1972) (language to be broadly construed).

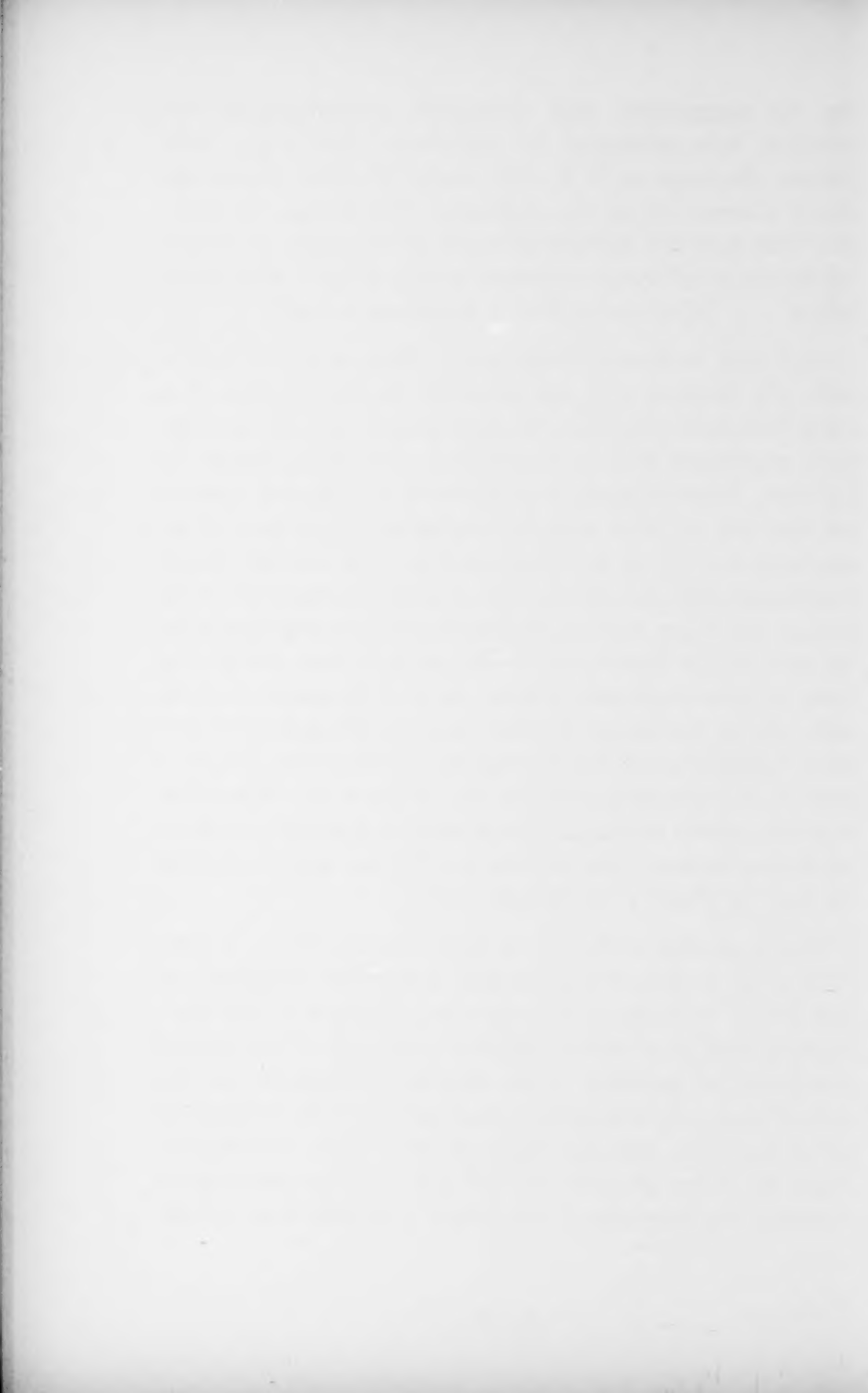
8 Appellant's reliance on *Slagle v. United States*, 612 F.2d 1157 (9th Cir. 1980), as a model for analysis is unavailing. Though the Ninth Circuit undertook to determine the precise nature of an informant's employment status in *Slagle*, the inquiry was made in the context of a claim against the Government for harm allegedly caused by the informant's negligence, not his intentional conduct. That close factual determinations concerning employment status are necessary under 28 U.S.C. § 2671, see *supra* n.7, does not provide persuasive grounds for extending the practice to decide mixed-claim cases under section 2680(h).



ries no suggestion that Congress contemplated the technical rule advanced by appellant. See, e.g., *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Committee on the Judiciary*, 77th Cong., 2d Sess. 33 (1942) (section 2680(h) directed at situations in which "some agent of the government gets in a fight with some fellow . . . [a]nd socks him") (emphasis added).

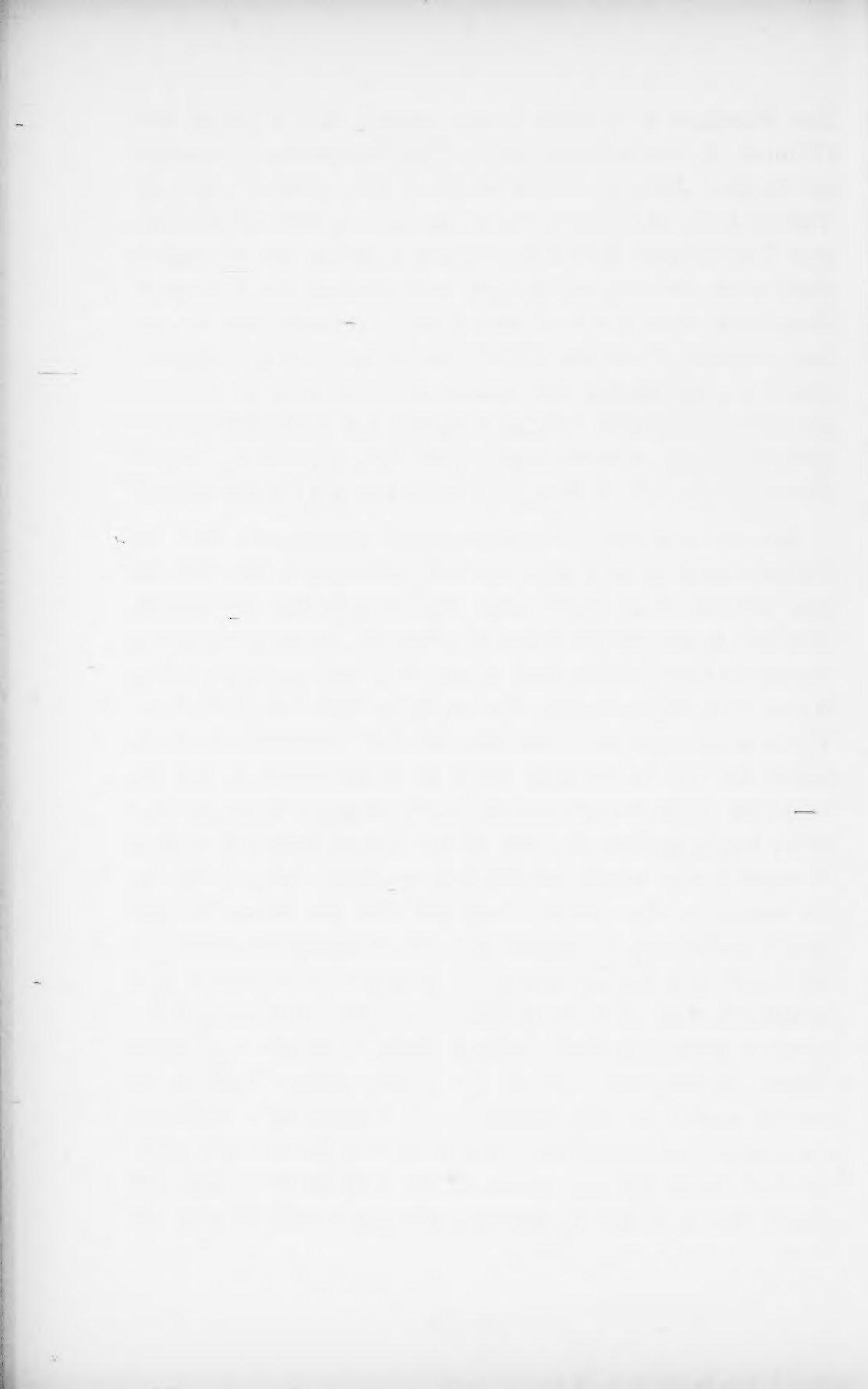
Appellant understandably reads *Panella* quite differently. He believes that the rationale of this decision is a sharp distinction between the intentional torts of Government *employees* and the intentional torts of all others. In his view, *Panella* made that distinction to guard against the risk that a claim alleging negligent supervision of an employee tortfeasor would succeed because the fact-finder is influenced by the doctrine of *respondeat superior*, even though the claim nominally alleges primary negligence on the part of the Government. His point is that intentional torts of *non-employees* should survive dismissal because such claims encounter no risk that an allegation of primary negligence on the part of the Government will be a pretext for imposing liability on the basis of *respondeat superior*, which is unavailable absent an employee or similar master-servant relationship, see *Prosser and Keeton on the Law of Torts* § 70 (5th ed. 1984).

This approach is flawed in two respects. First, it converts what is only a mechanical device for enabling the fact-finder to focus on the primary negligence of the Government into an absolute jurisdictional rule. If the critical jurisdictional question were whether negligence on the part of some Government personnel could be isolated as the primary or essential basis of the claim, the inquiry could be more sensibly carried out without pausing to ascertain the intentional tortfeasor's employment status.



See *Sheridan v. United States*, *supra*, 823 F.2d at 825 (Winter, J., dissenting); Note, *The Talismanic Language of Section 2680(h) of the Federal Tort Claims Act*, 69 Temple L.Q. 243 (1987); Note, *Section 2680(h) of the Federal Tort Claims Act: Government Liability for Negligent Failure to Prevent an Assault and Battery by a Federal Employee*, 69 Geo. L.J. 803 (1981). Indeed, one circuit has interpreted section 2680(h) to permit negligent supervision claims against the Government as long as the employee's intentional wrongdoing was a foreseeable consequence of the alleged negligence. See *Morrill v. United States*, *supra*, 821 F.2d at 1427 (citing Ninth Circuit cases).

Second, and more fundamentally, appellant's view of *Panella* fails to take into account subsequent case law in this Circuit that illuminates the boundaries of section 2680(h). In our effort to explain *Panella*, we are obliged to recognize that this decision does not stand in isolation but is part of a sequence that now includes *Johnson* and *Miele*. These latter cases demonstrate that the United States is not liable for the intentional torts of those carrying out its business, even though the plaintiff alleges a claim of primary negligence on the part of the United States in failing to supervise or otherwise avoid foreseeable risks. In *Miele*, for example, the plaintiffs alleged that the Army "negligently failed to: (1) appreciate [the assailant's] paranoid schizophrenic mental state; (2) adequately supervise [the assailant]; and (3) warn plaintiffs of [the assailant's] delusory preoccupation toward them." *Miele v. United States*, *supra*, 800 F.2d at 51. These claims, held to be barred under section 2680(h), are functionally indistinguishable from appellant's allegations in the present case. In both cases the gravamen of the complaint is that the Government failed to exercise adequate control over an



individual committing intentionally tortious conduct while acting in some capacity on the Government's behalf.

Weinberg, even if not technically a federal "employee," was certainly acting on the Government's behalf as an undercover operative carrying out the Abscam investigation. The language of appellant's complaint itself furnishes a sufficient basis for barring his claim under *Paniella*, *Johnson*, and *Miele*: "[T]he FBI employed or otherwise engaged Melvin Weinberg to assist in the [Abscam] investigation as an informant and operative, and Weinberg rendered his services, including all acts complained of herein, while under the control and supervision of the FBI and its special agents." Complaint ¶ 5; *see also id.* at ¶¶ 7, 8, 11, 17, 18.

The "Independent Affirmative Duty" Exception. Appellant's alternative argument is also without merit. Despite the broad reading given to section 2680(h)'s "arising out of" language, we have suggested that it may not bar mixed claims of negligence and intentional conduct in the relatively uncommon case in which the negligence alleged "was independent of the government's supervision of its employees," *Johnson v. United States*, *supra*, 788 F.2d at 853 n.8 (discussing cases). The precise contours of this "independent affirmative duty" doctrine are slowly evolving in other circuits, *see Doe v. United States*, 838 F.2d 220, 222-24 (7th Cir. 1988) (duty of Government child care center toward children in its care); *Thigpen v. United States*, *supra*, 800 F.2d at 398-402 (Murnaghan, J., concurring) (duty of Government hospital toward patients); *Gibson v. United States*, 457 F.2d 1391, 1394-96 (3d Cir. 1972) (duty to prevent assaultive conduct of juvenile delinquent Job Corps trainee under Government



care), and the doctrine has yet to be considered directly by this Court.⁹

The pending case, however, provides no occasion for elaboration of the doctrine. The mere fact that Guccione was the subject of an undercover investigation by the FBI gave rise to no special "affirmative duty" to protect Guccione independent of the Government's duty to supervise its agents. All citizens, of course, have the right to expect that the Government's agents will not cause deliberate harm to innocent persons. Breach of the high public trust necessarily placed in those carrying out covert law enforcement investigations justifiably causes concern, just as the magnitude of the indecencies alleged in *Johnson* was compounded due to the assailant's identity as an on-duty United States mail carrier. Yet to find an "independent affirmative duty" owed to each citizen in every case in which the Government carries out its basic functions would create an exception that would swallow the rule of section 2680(h). The present case is not one in which a plaintiff has been placed in the care or custody of the Government and thereafter suffers harm as a result of the negligent performance of a duty of protective care that the plaintiff was

9 *Panella v. United States*, *supra*, might be read as an affirmative duty case if attention is shifted from the Government's relationship to the *assailant* to its relationship to the *victim*, a patient at a federal prison hospital. See also *Brown v. United States*, 486 F.2d 284, 288 (8th Cir. 1973) (FTCA claim permitted where federal prisoner attacked by fellow inmates); *Rogers v. United States*, 397 F.2d 12, 15 (4th Cir. 1968) (FTCA claim permitted where prisoner alleged federal negligence led to attack by guardian); cf. *United States v. Muniz*, 374 U.S. 150 (1963) (prisoner attacked by other inmates permitted to claim Government negligent in providing protection). Under this approach, the Government undertakes a duty of reasonable care to protect those in its penal custody from foreseeable harm, whatever its source. See *Prosser and Keeton on Torts*, *supra*, at 383 n.9; *Restatement (Second) of Torts* § 314A, illustration 6 (1965); see also P. Schuck, *Suing Government* 33 (1983) (noting historical roots of liability of sheriffs and jailers).



entitled to rely upon. See *Doe v. United States*, *supra* (children in Government child care center); *Doe v. Scott*, 652 F. Supp. 549 (S.D.N.Y. 1987) (same); *Loritts v. United States*, 489 F. Supp. 1030 (D. Mass. 1980) (member of singing group invited to visit West Point). There is no suggestion that Guccione relied upon the Government's affirmative provision of care or services of any kind. Cf. *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) (Government liable for damages caused by negligently maintained lighthouse). Indeed, as far as Guccione knew, he was entering into arms-length business negotiations with a representative of Abdul, and he conducted himself accordingly. Whatever the ultimate contours of the affirmative duty doctrine, it is unavailable to Guccione under the circumstances of this case.

In view of our disposition, it is not necessary to reach the statute of limitations issue.

The judgment of the District Court is affirmed.

JUN 2 1982

A-18



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 662—August Term 1987

On petition for rehearing

Decided: June 9, 1989

Docket No. 87-6207

ROBERT C. GUCCIONE,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

OAKES, *Chief Judge,*

NEWMAN and MINER, *Circuit Judges.*

JON O. NEWMAN, *Circuit Judge:*

Appellant has petitioned for rehearing of our decision in *Guccione v. United States*, 847 F.2d 1031 (2d Cir. 1988), contending that the subsequent decision of the Supreme



Court in *Sheridan v. United States*, 108 S. Ct. 2449 (1988), obliges us to reinstate his claim. We disagree.

Sheridan concerned a claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680 (1982), brought by plaintiffs who had been wounded during the shooting escapade of an off-duty serviceman. Seeking to avoid the bar of the intentional tort exception to the FTCA, *id.* § 2680(h), the plaintiffs sought to hold the United States liable because of the negligence of three naval corpsmen in permitting the assailant to leave a naval hospital with a weapon in his possession. The corpsmen had found the assailant face down in a drunken stupor on the floor of the hospital. The Supreme Court ruled that the intentional tort exception was inapplicable because, though the assailant was an employee of the United States, his employment status "ha[d] nothing to do with the basis for imposing liability on the Government." 108 S. Ct. at 2455. The Court pointed out that the negligence of the three naval corpsmen "may furnish a basis for Government liability that is entirely independent of [the assailant's] employment status." *Id.* Their conduct could cast liability upon the Government even if the person they had permitted to leave the hospital with a weapon had no connection whatever with the United States.

Sheridan does not aid Guccione. His claim is based on the negligence of the United States in failing to supervise Melvin Weinberg in his role as an undercover operative in the Abscam investigation. Manifestly, Weinberg's role in relation to the United States is at the heart of Guccione's claim. Though the naval corpsmen in *Sheridan* may have had a duty to take reasonable steps to prevent any drunken person from leaving their hospital with a weapon, the only duty possibly owed to Guccione by the Government agents



with responsibilities for the Abscam investigation was to exercise reasonable care in the supervision of those persons acting in some way to carry out the governmental objectives of that investigation. Weinberg, unlike the assailant in *Sheridan*, was carrying out the Government's business during the episode in which he allegedly injured the tort plaintiff, even though he may have exceeded the bounds of proper conduct in the particular way he chose to carry out his assignment. Any negligent supervision on the part of those supervising the Abscam investigation is not "entirely independent" of the relationship between Weinberg and the United States, whether or not Weinberg's status was technically that of an "employee." In such circumstances, the negligent supervision claim encounters the obstacle of the intentional tort exception.

The petition for rehearing is denied.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROBERT C. GUCCIONE, : 85 Civ. 0333 (CBM)

Plaintiff, :

-against- :

UNITED STATES OF AMERICA, :

Defendant. - :

-----X

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OPINION

MOTLEY, District Judge.

Plaintiff Robert C. Guccione has brought this lawsuit under the Federal Tort Claims Act, 28 U.S.C. §1346(b), for injuries he allegedly sustained during the course of the FBI's highly publicized ABSCAM investigation of government corruption in late 1970's. Guccione is a well known magazine publisher and entertainment entrepreneur. He claims that his attempts to obtain financing for a contemplated Atlantic City, New Jersey casino were obstructed by the malicious and intentionally tortious conduct of an ill supervised FBI operative, Melvin Weinberg, thus causing Guccione injury in excess of four million dollars.

The Government has now moved for judgment on the pleading pursuant to Fed. R. Civ. P. 12(c) on the grounds that this court is

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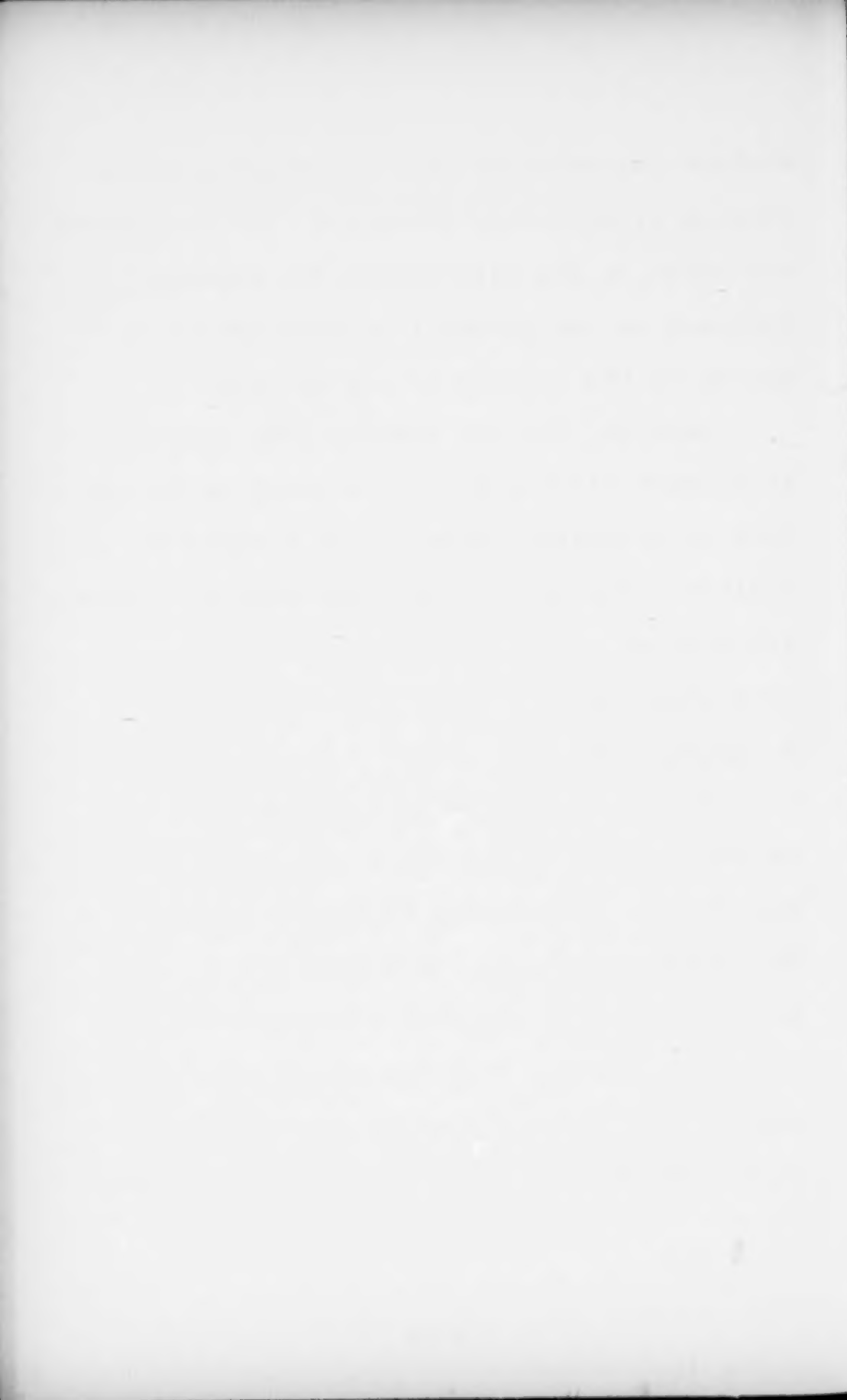
without jurisdiction over plaintiff's claim because of sovereign immunity. The Government has moved in the alternative for summary judgment on the ground that this action is barred by the statute of limitations.

Because, for the reasons that follow, this court finds plaintiff's claim is barred both on sovereign immunity and statute of limitations grounds, the Government's motions are granted and this case is dismissed.

Sovereign Immunity

a. Background

Plaintiff alleges in his complaint that he was injured by the FBI's negligent supervision and control of Melvin Weinberg, a key operative in the FBI's ABSCAM investigation in the 1970's. Specifically, plaintiff alleges that "in carrying out ABSCAM, the FBI employed or otherwise engaged Melvin Weinberg," an individual with a known



history of illegal fraudulent activity, "to assist in the investigation as an informant operative, and [that] Weinberg rendered his services ... while under the control of the FBI and its special agents." (Complaint, ¶¶5, 6, 7) According to plaintiff, Weinberg posed as the agent of a fictitious Arab investment company called Abdul Enterprises at the direction and under the supervision of the FBI. (Complaint ¶8)

During the period of time that ABSCAM was being carried out, plaintiff was attempting to obtain financing for an Atlantic City casino project. In connection with this project, Guccione's application for a casino license was pending before various state and local New Jersey authorities. (Complaint ¶9, 10) Plaintiff alleges that Melvin Weinberg, acting "with the full knowledge, acquiescence, support, cooperation, assistance and/or



direction of his supervising FBI agents," "undertook to persuade plaintiff to commit illegal acts," including the bribery of a state casino licensing official. (Complaint ¶11) When Guccione, according to his complaint, refused to participate in the illegal activities, "Weinberg engaged in a series of intentional, wrongful acts including . . . defaming plaintiff, interfering with plaintiff's business venture, and making false and unfounded representations concerning plaintiff's integrity and character to prospective lenders" (Complaint ¶13) As a result of Weinberg's defamatory misrepresentations, plaintiff was allegedly unable to obtain financing to complete the casino project.

The gravamen of plaintiff's claim against the United States is that the "FBI had a duty to control the conduct of Weinberg so as to



prevent him from causing injury to Guccione .
. . . ." (Complaint ¶17) Plaintiff claims that
the "FBI breached that duty by failing to use
requisite care in selecting, training,
instructing, supervising and controlling
Weinberg in his role as agent for 'Abdul
Enterprises,'" and that plaintiff was injured
as a proximate result of this negligence.

b. Discussion

The United States is immune from suit
absent an express waiver of its sovereign
immunity. United States v. Testan, 424 U.S.
392, 399 (1976). Absent such a waiver, the
federal courts are without subject matter
jurisdiction to entertain a suit against the
United States. Lamberston v. United States,
528 F.2d 441, 443 (2d Cir.), cert. denied, 426
U.S. 921 (1976).



The Federal Tort Claims Act waives the government's sovereign immunity for certain claims caused by the "negligent or wrongful act or omission" of a government employee. 28 U.S.C. §1346(b). The FTCA is only a limited waiver of immunity, however, and Section 2680 of the Act sets forth several categories of tort claims for which the United States has not waived its immunity. One of these, the "intentional torts exception" to the FTCA's waiver of immunity, 28 U.S.C. §2680(h), clearly bars plaintiff's claims in this suit.

Section 2680(h) provides that the United States' waiver of sovereign immunity under the FTCA shall not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contrary



rights."¹ (emphasis added). The Second Circuit has interpreted the clear language of the statute as barring all claims "arising out of" the enumerated intentional torts, regardless of whether the claims are pleaded forthrightly in terms of the intentional tort itself, or indirectly, as claims for negligent supervision of the intentional tortfeasor, or negligent failure to protect the victim from the intentional tortfeasor's harmful propensities. Miele v. United States, 800 F.2d 50 (2d Cir. 1986); Johnson v. United

¹The 1974 amendment to the intentional tort exception to the FTCA, 28 U.S.C. §2680(h), narrows the exception so as to permit claims against federal law enforcement officers "arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." The liberalization of the government's waiver of sovereign immunity is inapplicable in the present case, however, because the intentional torts complained of by plaintiff are in the nature of libel, slander, misrepresentation, deceit, and interference with contract rights, categories for which the United States preserved its immunity.



States, 788 F.2d 845 (2d Cir. 1986), cert. denied, 107 S.Ct. 315 (1986). See also United States v. Shearer, 473 U.S. 52, 55 (1985) (plurality opinion); Thigpen v. United States, 800 F.2d 393 (4th Cir. 1986); Satterfield v. United States, 788 F.2d 395, 399-400 (6th Cir. 1986); Garcia v. United States, 776 F.2d 116, 117-18 (5th Cir. 1985); Wine v. United States, 705 F.2d 366 (10th Cir. 1983); Naisbitt v. United States, 611 F.2d 1350 (10th Cir.), cert. denied, 449 U.S. 885 (1980).

As stated by the court in Miele,

The intentional tort exception to the Act bars not only claims for assault and battery, but also any claim arising out of the assault and battery. "[I]t is inescapable that the phrase 'arising out assault [or] battery' is broad enough to encompass claims sounding in negligence." (citing United States v. Shearer, 105 S.Ct. at 3043.)

Allowing claims against the government that are stated in negligence, but actually arise from an assault and battery would defeat Congress' purpose to bar



suits against the government for injuries caused by a government employee's commission of assault and battery. (citing Johnson v. United States, 788 F.2d 845, 850 (2d Cir. 1986)).

Miele v. United States, 800 F.2d at 52 (2d Cir. 1986) (emphasis in original).

The Second Circuit's reasoning in Johnson was equally broad and explicit:

It is . . . clear that the claim here is for injuries caused by the employee's assault and battery and that, absent the assault and battery, no claim could exist . . . To permit such a claim to be stated in terms of a negligence theory . . . would defeat Congress' purpose in enacting §2680(h). The claim, although stated in terms of negligence, would still be for injuries caused by and arising out of the assault and battery.

Johnson v. United States, 788 F.2d at 850-51 (2d Cir. 1986) (emphasis in original) (citations omitted).



In the present case, plaintiff alleges that he suffered injuries in excess of four million dollars caused by the defamatory misrepresentations and other wrongful acts of FBI operative Melvin Weinberg. Plaintiff also alleges the actual participation of FBI agents in Weinberg's various intentional torts by virtue of their "cooperation, assistance and/or direction" in Weinberg's activities. (Complaint ¶11) In the face of the FTCA's unambiguous refusal under 28 U.S.C. §2680(h) to recognize claims for intentional torts, however, plaintiff's theory of government liability is that the FBI was negligent in its selection, training and supervision of Weinberg. (Complaint ¶18)

There can be no question, from the clear language of plaintiff's complaint, that Guccione's claims arise out of the alleged intentional torts of both Weinberg and the



FBI's own agents. Thus, regardless of whether they are pleaded as claims grounded in the intentional torts themselves, or as claims against the FBI for its alleged negligent supervision and control of Weinberg, Guccione's claims are barred by the intentional torts exception to the FTCA, §2680(h), and by the Second Circuit's broad and logical interpretation of this section in Miele and Johnson.

Plaintiff has argued that his claims are not barred by §2680(h) or by holdings in Johnson and Miele because Weinberg was not an official government employee at the time he committed the intentional torts of which plaintiff here complains. Plaintiff contends that although under current Second Circuit laws the United States could not be liable for the negligent supervision of Weinberg had he been a formal government employee, because

Weinberg was a mere "informant" or "operative" of the FBI, see Complaint ¶5, the government may indeed be liable for injuries arising out of Weinberg's intentional torts by virtue of FBI negligence in supervising and controlling him. Guccione relies primarily on the case of Panella v. United States, 216 F.2d 622 (2d Cir. 1954) for this proposition.

In Panella v. United States, 216 F.2d 622 (2d Cir. 1954), the Second Circuit held that the intentional tort exception to the FTCA did not bar claims arising out of the intentional torts of third parties in the government's custody or control where the injury was attributable to a federal employee's negligent supervision of the tortfeasor. Panella involved an assault by one prisoner on another prisoner in a hospital prison, allegedly caused by the government's failure to provide adequate guards and otherwise properly



supervise those confined in the institution.
Id. at 623. Panella has been narrowly applied to permit a negligent supervision claim, despite the strictures of §26890(h), in a limited number of cases where the tortfeasor's conduct was in no way at government behest and where the essence of the tortfeasors' relationship with the government was precisely to be supervised. See Muniz v. United States, 305 F.2d 285 (2d Cir. 1962), aff'd, 374 U.S. 150 (1963) (assault by federal prison inmates on another inmate); Gibson v. United States, 457 F.2d 1391 (3d Cir. 1972) (attack on counsellor by mentally imbalanced drug addict enrolled in program at federal camp); Fleishour v. United States, 244 F. Supp. 762, 766 (N.D. Ill. 1965), aff'd, 365 F.2d 126 (7th Cir.), cert. denied, 385 U.S. 987 (1966) (assault by federal prisoner on another prisoner).

Plaintiff's suggestion that Panella should be applied to allow his claim for negligent supervision in this action on the grounds that Weinberg was a third party rather than a government employee is utterly without merit. Even if Weinberg's status as a federal employee within the meaning of the FTCA remains unclear,² according to plaintiff's own complaint Weinberg was no mere third party. Instead, Weinberg's ABSCAM activities are alleged to have been at the behest of the FBI and in furtherance of the FBI's own goals, for better or for worse. Furthermore, the context of Weinberg's ABSCAM operations, a context in which the essence of Weinberg's relationship with the FBI was to perform services, is in stark contrast to the situation dealt with in cases such as Panella where supervision or care of the intentional tortfeasor is the

²See infra, pp.531-32.



whole reason for any relationship between the tortfeasor and the government in the first place. Thus, because the facts and the rationale of Panella are so entirely distinct from Guccione's situation, this case provides no support for plaintiff's attempt to bypass the intentional tort exception to the FTCA by pleading negligent supervision.

Guccione also appears to make a more general argument that his claim should not be barred by the intentional tort exception of the FTCA and by the Johnson and Miele holdings disallowing intentional tort claims in the guise of negligent supervision claims. Even without reference to Panella, argues plaintiff, simply because Weinberg was not formally a government employee Johnson and Miele do not bar Guccione's FTCA suit for negligent supervision of the intentional tortfeasor. This argument is unconvincing,



not only because the formal employee status of the tortfeasor is irrelevant under the broad "arising out of" holdings of Johnson and Miele, but also because it ignores relevant case law directly to the contrary, disregards explicit provisions of the FTCA itself, and leads to absurd results.

To begin with, the FTCA's definition of "employee" for purposes of the Act does not require that a person possess formal employee status. Rather, it includes any "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. §2671. See Witt v. United States, 462 F.2d 1261, 1263-64 (2d Cir. 1972); see also Logue v. United States, 412 U.S. 521, 526-28 (1973). Weinberg is alleged by plaintiff to have been "employed or otherwise engaged" by the FBI "to



assist in the [ABSCAM] investigation" and to have "rendered his services, including all acts complained of [in the complaint]" while so engaged. Although the ultimate determination of Weinberg's federal employee status is a factual one which is not properly addressed in this motion for judgment on the pleadings,³ by the plain language of plaintiff's complaint, Weinberg's relationship with the FBI during his ABSCAM activities was either that of an employee within the meaning of the Act, or at least that of an independent

³The liberal reading in a plaintiff's favor necessarily accorded to a complaint on a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is less applicable in a motion to dismiss based on lack of subject matter jurisdiction. Indeed, in the context of a complaint brought under the FTCA, plaintiff is required to allege sufficient independent facts to withstand any potential bars to the court's subject matter jurisdiction. The court must "look beneath the language of the complaint to determine the substance of the claim." Johnson v. United States, 788 F.2d 845, 854 (2d Cir. 1986) (citations omitted).



contractor. See Logue v. United States, 412 U.S. 521, 527-28 & n.5 (1973) (an independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking).

If Weinberg were ultimately found to have been an employee for FTCA purposes under the broad definition set forth in the statute, see Socialist Workers Party v. Attorney General of the United States, 642 F.Supp. 1357, 1423 (S.D.N.Y. 1986) (FBI informants held to be employees for purposes of FTCA), then plaintiff's contention in this motion that he is entitled, notwithstanding Miele and Johnson, to make a negligent supervision claim because Weinberg was not officially a government employee would fall fatally flat.



If, on the other hand, Weinberg were found to have been an independent contractor, see Slagle v. United States, 612 F.2d 1157, 1159-61, 1163 (9th Cir. 1980) (informant may be an independent contractor within the meaning of the FTCA), then case law and common sense make it apparent that plaintiff could not make out a cause of action against the government for the intentionally tortious defamatory acts of this individual who, as an independent contractor, was beyond the FBI's right of control. See United States v. Orleans, 425 U.S. 807, 814-15 (1976); Logue v. United States, 412 U.S. 521, 525-27 (1973). It defies logic that the United States could be held liable, via a theory of negligent supervision, for the intentional torts of non-employee, independent contractor FBI



operatives, even while it could not be held liable for negligent supervision of its own employees who committed intentional torts.

Finally, regardless of the label that is applied to Weinberg's employment relationship with the FBI, all circuits that have considered the matter have held that the intentional tort exception of the FTCA covers intentional torts by informants or undercover operatives and that this limitation cannot be circumvented by allegations that these individuals were negligently supervised or controlled. Boda v. United States, 698 F.2d 1174 (11th Cir. 1983); Leaf v. United States, 661 F.2d 740 (9th Cir. 1981), cert. denied, 456 U.S. 960 (1982); Redmond v. United States, 518 F.2d 811 (7th Cir. 1975). Furthermore, although the Second Circuit has never directly ruled on the applicability of the intentional torts exception to undercover informants or



operatives, in Johnson v. United States, where the court unambiguously announced its broad interpretation of the "arising out of" language of the §2680(h), it also explicitly rejected the reasoning of the major case relied on by plaintiff herein for the proposition that intentional torts by undercover operatives may be actionable on a theory of negligent supervision, Liuzzo v. United States, 508 F. Supp. 923 (E.D. Mich. 1981). Johnson v. United States, 788 F.2d 853 n.8 (2d Cir. 1986).⁴

⁴ Liuzzo v. United States, 508 F. Supp. 923 (E.D. Mich. 1981), and the related district court case of Bergman v. United States, 565 F. Supp. 1353 (W.D. Mich. 1983), in allowing claims based on the government's alleged negligent supervision and negligent failure to warn with respect to certain violent undercover operatives, both clearly rejected the reasoning later set forth by the Second Circuit in Johnson and Miele in disallowing such claims. Both Liuzzo and Bergman concluded that the intentional tort exception to immunity created by §2680(h) should not be applied "[w]hen injuries directly resulting from assaults and batteries may be reasonably
(footnote continued)



In conclusion, and notwithstanding plaintiff's strained argument that he has stated a cognizable claim against the government for its negligent supervision and control of Melvin Weinberg, Guccione's claim for injuries allegedly sustained with respect to his Atlantic City casino project

(footnote continued from previous page)
alleged to have their roots in negligence." Bergman, 565 F. Supp. at 1411 (citing Liuzzo at 928-29).

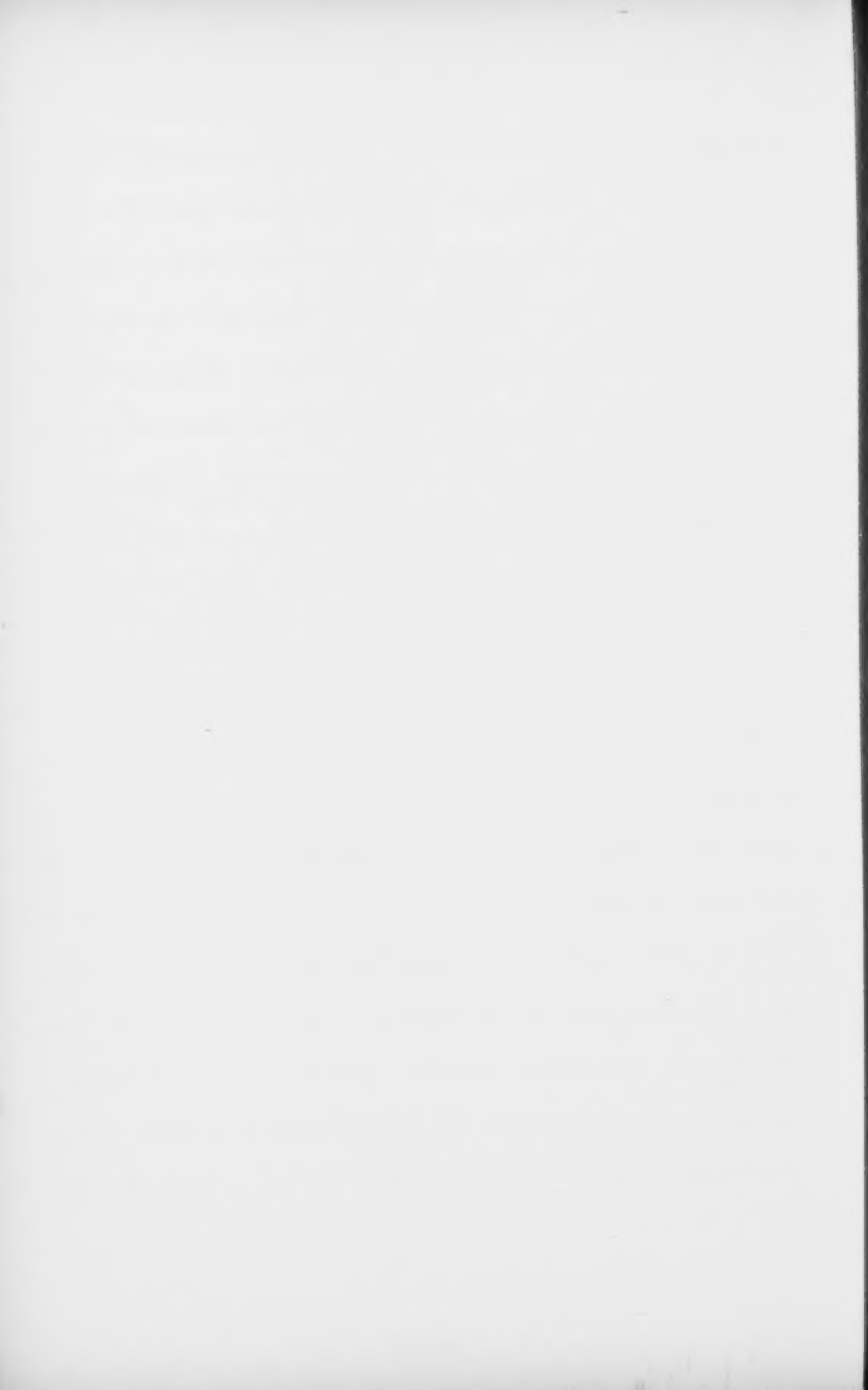
Moreover, without deciding whether the informant tortfeasors were or were not employees within the meaning of the FTCA, in holding that the government could be liable by reason of its alleged negligent supervision, Liuzzo explicitly and emphatically rejected the significance of the intentional tortfeasor's employment status. 508 F. Supp. at 930. Thus, Guccione's attempt to circumvent Miele and Johnson by relying on the employment status of Weinberg is at odds with the principal case relied on by plaintiff himself. In fact, Liuzzo achieves the result advocated by plaintiff in this motion -- permitting a claim for the government's negligent supervision of an intentional tortfeasor -- only by its wholehearted rejection of the broad "arising out of" interpretation of §2680(h) which controls in this Circuit.



unquestionably arose out of the alleged intentional torts of a government operative, and thus falls within the FTCA's intentional tort exception to the United States' waiver of sovereign immunity. Accordingly, this court having no subject matter jurisdiction over plaintiff's claim, it is dismissed in its entirety.

Statute of Limitations

Plaintiff's failure to file the present lawsuit within the applicable statute of limitations provides an adequate and independent basis for dismissal of this action. Based on factual material in the form of news clippings and letters from plaintiff's own files, and other public information that was widely and prominently reported in the New York and national press, it is beyond dispute that plaintiff knew or should have known the critical facts of his claim by at least March



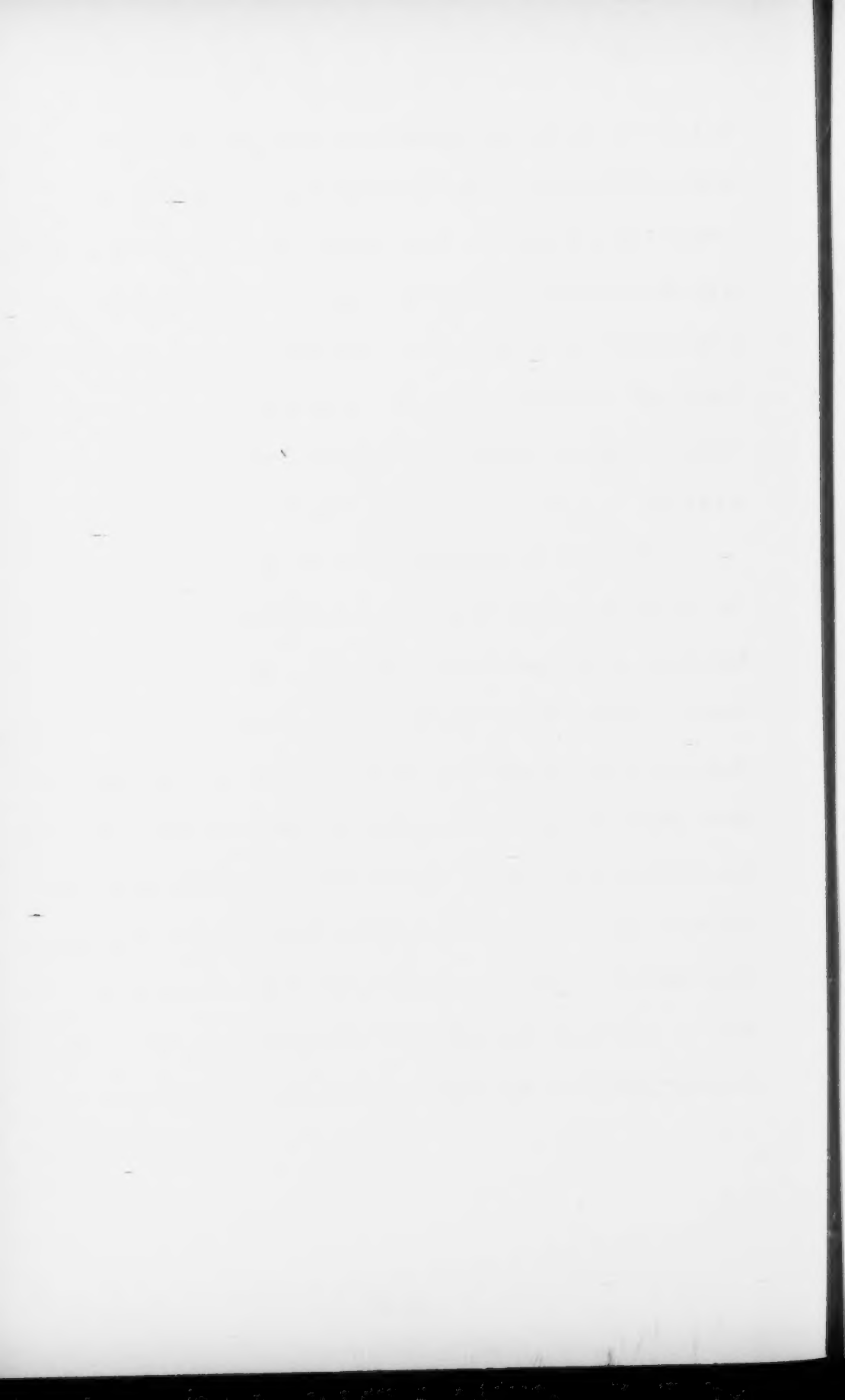
1982, if not well before that. Thus, plaintiff's initiation of this action on November 28, 1984 was unquestionably untimely under the applicable two year statute of limitations.

a. Facts

It is undisputed that plaintiff's dealings with Melvin Weinberg as a representative of "Abdul Enterprises," from which the injuries complained of herein are said to have arisen, occurred in late 1978 and early 1979. Plaintiff met or spoke with Weinberg during this time on at least three separate occasions to discuss prospective financing for Guccione's casino project. Weinberg, who used his own name, also suggested on these occasions the possibility of securing a casino license through corrupt means. According to plaintiff's complaint, the FBI's negligent supervision and control of

Weinberg made it possible for Weinberg surreptitiously to defame Guccione to potential lenders and otherwise interfere with his business projects. According to plaintiff's complaint, Weinberg's defamatory tactics caused crucial lenders to shy away, resulting in vast financial injury to plaintiff.

The FBI's ABSCAM investigation resulted in several highly publicized indictments and trials of prominent individuals in 1980 and 1981. When the FBI's undercover tactics during the course of the ABSCAM investigation, and particularly its use of Melvin Weinberg as an operative, were revealed, they became the object of extensive debate and criticism in the media. The controversy regarding the FBI's conduct of ABSCAM resulted in an investigation by the United States Senate,



which in turn resulted in the publication of a report by a select committee of the Senate in January 1983.⁵

Plaintiff initiated the present action on November 28, 1984 by presenting an administrative claim to the FBI.⁶ Thus, in

⁵ Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice to the United States Senate, S. Rep. No. 682, 97th Cong., 2d Sess. (1982) (ordered to be printed December 15 (legislative day November 30), 1982)).

⁶ Plaintiff filed an initial administrative claim seven months earlier on July 18, 1984 which was rejected by the agency because it did not contain a "sum certain" of alleged damages. It is well established that the statement of a "sum certain" in the administrative complaint is a jurisdictional prerequisite to any claim under the Federal Tort Claims Act. See, e.g., Allen v. United States, 517 F.2d 1328 (6th Cir. 1975); Cooper v. United States, 498 F.Supp. 116, 118 (W.D.N.Y. 1980); Miller v. United States, 418 F.Supp. 373 (D. Minn. 1976); College v. United States, 411 F.Supp. 738 (D. Md. 1976), aff'd, 572 F.2d 453 (2d Cir. 1978); Fallon v. United States, 405 F.Supp. 1320 (D. Mont. 1976). See also Lotrionte v. United States, 560 F.Supp. 41 (S.D.N.Y. 1983), aff'd, 742 F.2d 1436 (2d Cir. 1983). Thus, there appears to have been nothing improper or out of the ordinary about
(footnote continued)

order for his claim to have been timely under the FTCA's two year statute of limitations, it must have accrued no earlier than November 1982.

Plaintiff contends that his claim did not accrue until January 1983 when the publication of the Senate Report on ABSCAM alerted him for the first time to the critical facts of the injury he had suffered in the late 1970's as a result of the FBI's undercover operation. In determining when plaintiff knew or should have known, however, the critical facts of his alleged injury,⁷ the court must also consider

(footnote continued from previous page)
the agency's rejection of plaintiff's initial complaint. In any event, as discussed below, even if the July 1984 filing had been accepted, it would still not have been within the two year limitations period which began running clearly no later than March 1982.

⁷As discussed infra, pp. 535-36, the date on which Guccione either knew or reasonably should have known the critical facts of his alleged injury provides the most liberal accrual date potentially available to him on the claims asserted herein.



the following indisputable facts as to information about ABSCAM that was publically available, and indeed known to plaintiff, far earlier than the publication of the Senate's Report.

The extensive press coverage arising out of the ABSCAM indictments and trials made the existence of this notorious FBI investigation a matter of public knowledge by 1980.

ABSCAM's focus on the Atlantic City gambling industry, and its use of Melvin Weinberg as a representative of "Abdul Enterprises" were prominently reported. Defendant's Exhibits J, K, L, M, N, O, P and Q. (More than 20 news articles published during 1980 in various newspapers and magazines, including all four major New York City dailies; Exhibits N, O and P, regarding the trial and conviction of one of the ABSCAM defendants are from plaintiff's own files of news clippings.)



By 1981 it is clear that plaintiff also knew he was a potential target of the ABSCAM investigation. There was extensive press coverage of the fact that the FBI had been interested in Guccione's potentially illegal Atlantic City activities during the ABSCAM investigation. Defendant's Exhibit O, P (several news articles dating from 1980 and 1981, including one in the New York Times, discussing a recently unsealed 1979 affidavit of a government prosecutor linking Guccione with ABSCAM targets). See also, e.g., Defendant's Exhibits R, U, CC (1981 press coverage implicating Guccione and his business ventures in the ABSCAM scandal). Several of these articles were discovered during the course of the present litigation in plaintiff's own files of news clippings.



There was also press coverage, during and even prior to 1981, of the reactions of plaintiff and his lawyer, Norman Roy Grutman, to these reports implicating Guccione in the 1979 ABSCAM investigation. An Associated Press Story dated September 6, 1980 quotes Grutman as saying that the allegations were "utterly shocking." Defendant's Exhibit O at p.3. Another Associated Press syndicated story dated January 19, 1981 reported the reactions of Guccione, himself, as follows:

Penthouse magazine publisher Robert Guccione says a key Abscam operative offered to arrange a multimillion-dollar loan for Guccione's Atlantic City casino project if the publisher bribed the chairman of the New Jersey Casino Control Commission.

"They wanted to create corruption," Guccione said in a weekend interview with The Associated Press. "It didn't make sense to me what they were up to, but now it's all clear."

This January 19, 1981 story, Defendant's Exhibit R, pp.3-4, a copy of which was discovered in plaintiff's clippings files, continued by reporting Guccione's version of his contacts with Melvin Weinberg in 1979.

Another critical element of plaintiff's claim against the government in this lawsuit is the specific injury allegedly suffered, i.e., that the FBI's conduct of ABSCAM had the effect of obstructing Guccione's ability to obtain crucial financing for his casino project. Press coverage, including statements from Guccione, and material from plaintiff's own files indicate his actual awareness that his implication in ABSCAM had had such an effect. See Defendant's Exhibit V (Wall Street Journal article dated Feb. 15, 1980 assessing the effect of ABSCAM and quoting Guccione on the investigation's adverse effect on financing availability). See also



Defendant's Exhibits W, X (February and September 1980 letters from financial institutions regarding the damage to plaintiff's financing efforts caused by ABSCAM.) A September 27, 1980 letter concerning the casino's financing problems, Defendant's Exhibit X, which clearly came to Guccione's direct attention,⁸ is particularly noteworthy for the following statement: "There are also grave rumors of huge debts incurred by you . . . and of course Abscam and organized crime connections." Defendant's Exhibit X.

A final category of information crucial to the FTCA claim that plaintiff has made in this lawsuit⁹ is information regarding the

⁸ Attached to this letter discovered in plaintiff's files was a cover memo addressed to a Guccione aide that stated, "Mr. Guccione asked that I send a copy of the attached correspondence to you."

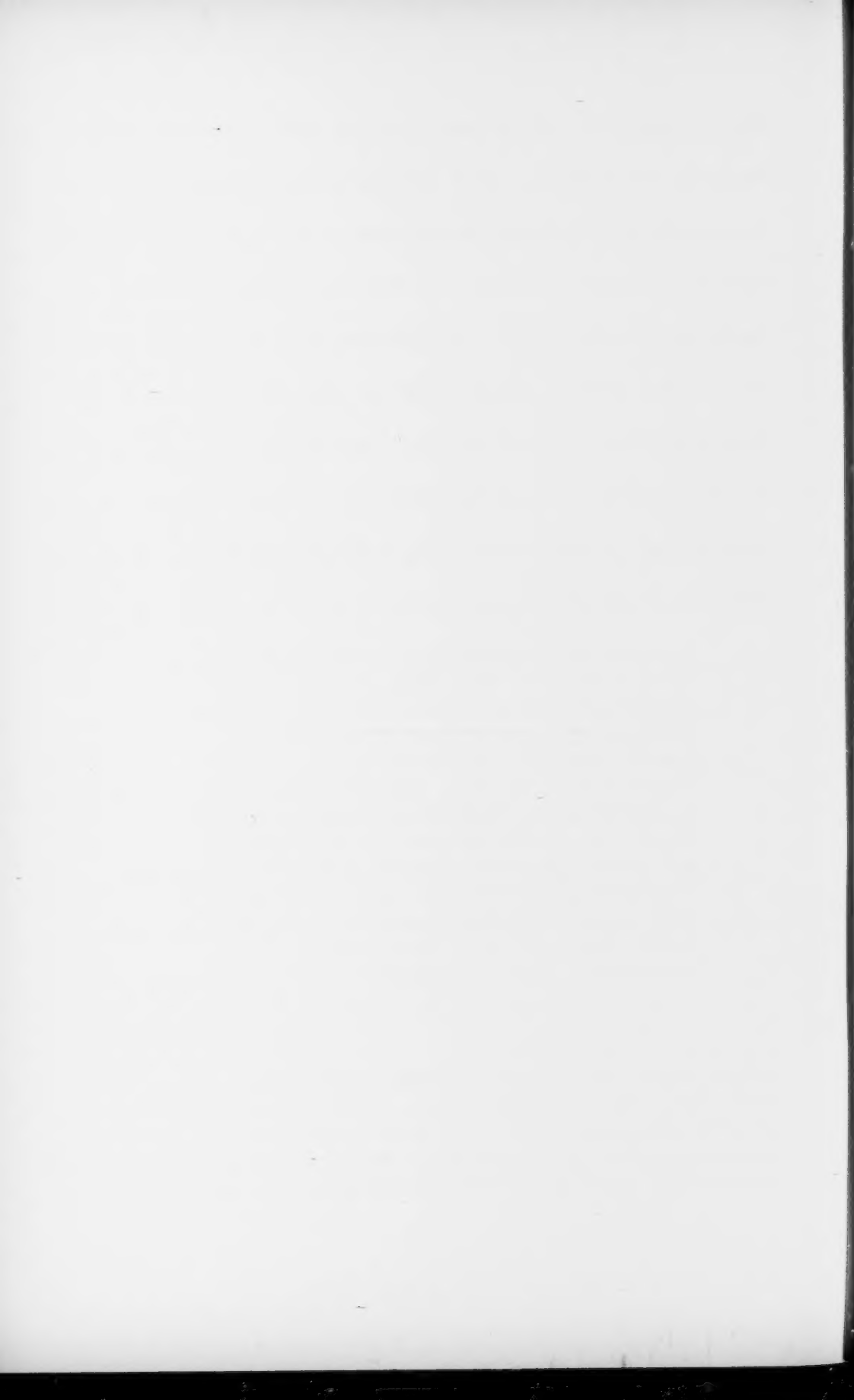
⁹ The court has already ruled, of course,
(footnote continued)



FBI's manner of supervising and controlling Melvin Weinberg, the undercover operative who allegedly stymied Guccione's casino financing efforts. It is beyond dispute that well before March 1982, Guccione was fully aware that the FBI's handling of Weinberg was extraordinarily flawed. An article in plaintiff's own publication, Penthouse Magazine, regarding the FBI's conduct of ABSCAM states in pertinent part:

Weinberg became an unguided missile for the FBI. In flagrant violation of the bureau's own rules for the handling of informants -- rules that require FBI agents to keep a constant, careful record of what informants do and say as they pursue their prey -- Weinberg filed no reports, and the agents responsible for him kept few if any written records. Accordingly, fast-

(footnote continued from previous page) earlier in this opinion, that plaintiff's claim against the FBI for negligence in its supervision of Weinberg is barred by sovereign immunity and must be dismissed in any event.



buck Mel was free to use
unconstitutional means to bag
his game.

Defendant's Exhibit Y at p.1 (September 1981
Penthouse Magazine article by Nat Hentoff).
Other articles and columns, including a series
of nationally syndicated columns by Jack
Anderson, expressing similar outrage over the
FBI's unaccountable relationship with Weinberg
and its overall lax handling of the
investigation appeared prominently in the
national press. See Defendant's Exhibits Z,
AA (including New York Times, Christian
Science Monitor, and Newsday, etc., articles
from between May 1981 and March 1982). A May
1981 Newsday story reporting that "[s]ome
members of Congress . . . have accused the FBI
of inadequate control over informants and
middlemen in the probe," Defendant's Exhibit
AA, and a March 1982 Christian Science Monitor
piece recounting Senator Alan Cranston's



charges "that the chief undercover operator, convicted con-man Mel Weinberg, 'was totally out of control' in Abscam," Defendant's Exhibit AA, are typical.

b. Discussion

Title 28 U.S.C. §2401(b) provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues" The general rule for accrual of an FTCA claim is that accrual occurs at the time that the injury or harm is inflicted. See Barrett v. United States, 689 F.2d 324, 327 (2d Cir. 1982), cert. denied, 462 U.S. 1131 (1983). Applying this most commonly applicable FTCA accrual rule, the accrual of Guccione's claim would have been in 1979 when he was allegedly injured by Weinberg's defamatory activities and the FBI's negligent supervision of this

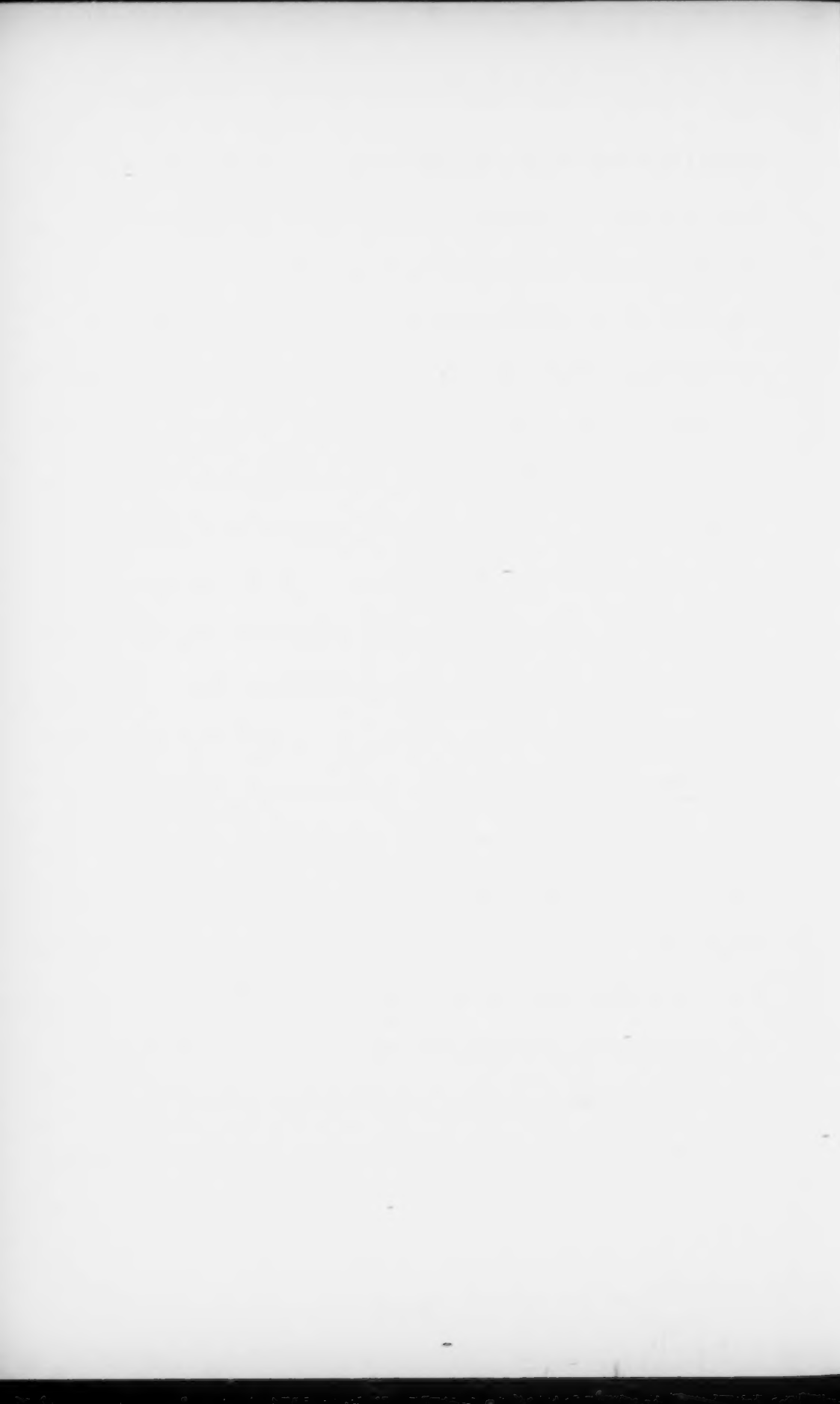
individual. There would be no question were this accrual standard to be applied that Guccione's 1984 filing was untimely.

In exceptional FTCA cases, however, for example in medical malpractice actions where plaintiff's injury may be "unknown" or "inherently unknowable" at the time it occurs, the application of a diligence-discovery rule of accrual may be applied. United States v. Kubrick, 444 U.S. 111 (1979); Barrett v. United States, 689 F.2d at 327. This special rule of accrual may also be applied where it has been shown that the plaintiff was blamelessly ignorant of his claim due to the government's deliberate concealment of its facts. Barrett v. United States, 689 F.2d at 327.

The diligence-discovery rule of accrual provides that accrual may be postponed until the plaintiff has or with reasonable diligence



should have discovered the "critical facts" of his claims. Barrett v. United States, 689 F.2d at 327. Possession of the "critical facts" of a claim means knowledge of or knowledge that could lead to, the basic facts of the injury, i.e., knowledge of the injury's existence and knowledge of its cause or of the person or entity that inflicted it. See United States v. Kubrick, 444 U.S. 122; Barrett v. United States, 689 F.2d at 328. In order for a claim to accrue under the diligence discovery rule, a plaintiff need not know each and every relevant fact of his injury or even that the injury implicates a cognizable legal claim. United States v. Kubrick, 444 U.S. 111 at 122. Rather, a claim will accrue when the plaintiff knows, or should know, enough of the critical facts of injury and causation to protect himself by seeking legal advice. Kubrick at 122-25, Lee



v. United States, 485 F. Supp. 883, 886 (E.D.N.Y. 1980). Whether a plaintiff "should have known" these critical facts even if he did not actually know them, is decided by reference whether a reasonable person exercising due and reasonable diligence would have discovered such facts. See Barrett v. United States, 689 F.2d at 330.

Whether the exceptional diligence-discovery rule of accrual for an FTCA claim is triggered is a factual question. In the present case, in order for this rule to apply, plaintiff has the burden of proving that there was some deliberate attempt by the government to conceal the critical facts of his claim. Although in his complaint plaintiff has not even pleaded such allegation, he has argued it on this motion. While given the context of the alleged injury here the FBI's interest in concealment does not seem at all unlikely,



this ultimate determination cannot be made on this motion. The disputed issue of material fact as to whether there was active FBI concealment, however, does not preclude a grant of summary judgment in this action. Assuming, arguendo, that the more generous discovery rule of accrual had in fact been triggered by the government's active concealment, it is still beyond dispute that plaintiff knew or should have known by at least March 1982 the critical facts of the claim here asserted.

Extensive press coverage of the ABSCAM trials and the ABSCAM controversy in general, dating from 1980 to early 1982, much of which was contained in plaintiff's own news clipping collection, revealed the critical facts that Guccione had been of interest to the FBI in connection with the investigation and that Melvin Weinberg had been one of its key



operatives. The outrageousness of Weinberg's techniques and the shocking laxness of the FBI's supervision of this individual had both been extensively criticized in the press. Guccione knew that rumors about him arising out of ABSCAM had seriously hampered his ability to obtain casino financing. By well before March 1982 Guccione knew that his dealings with Weinberg in late 1978 and 1979 had not been any ordinary business contacts but were wholly a product of FBI scheming. These facts were more than enough to alert him to the claim he sets forth in the present lawsuit.

Guccione argues that his claim did not accrue until the publication of the Senate Report in January 1983 because he did not know and could not have discovered certain specific details of his present allegations regarding Weinberg's intentionally tortious activities



in 1979 and the FBI's failure to oversee Weinberg properly. The court rejects this argument. The diligence discovery rule does not preclude a claim from accruing until a plaintiff has actual access to every detail of his alleged injury and to information alerting him to every possible legal theory of recovery to which his injury might give rise. Because the information regarding Guccione in the Senate Report is largely duplicative, though it provides greater detail, of information that had already been a matter of public knowledge by early 1982, the Senate Report's publication cannot supply plaintiff with his desired later accrual date.

To the extent that Guccione contends that prior to the publication of the Senate Report he did not have sufficient information to make the specific allegations he has asserted in this action, i.e., that in the late 1970's

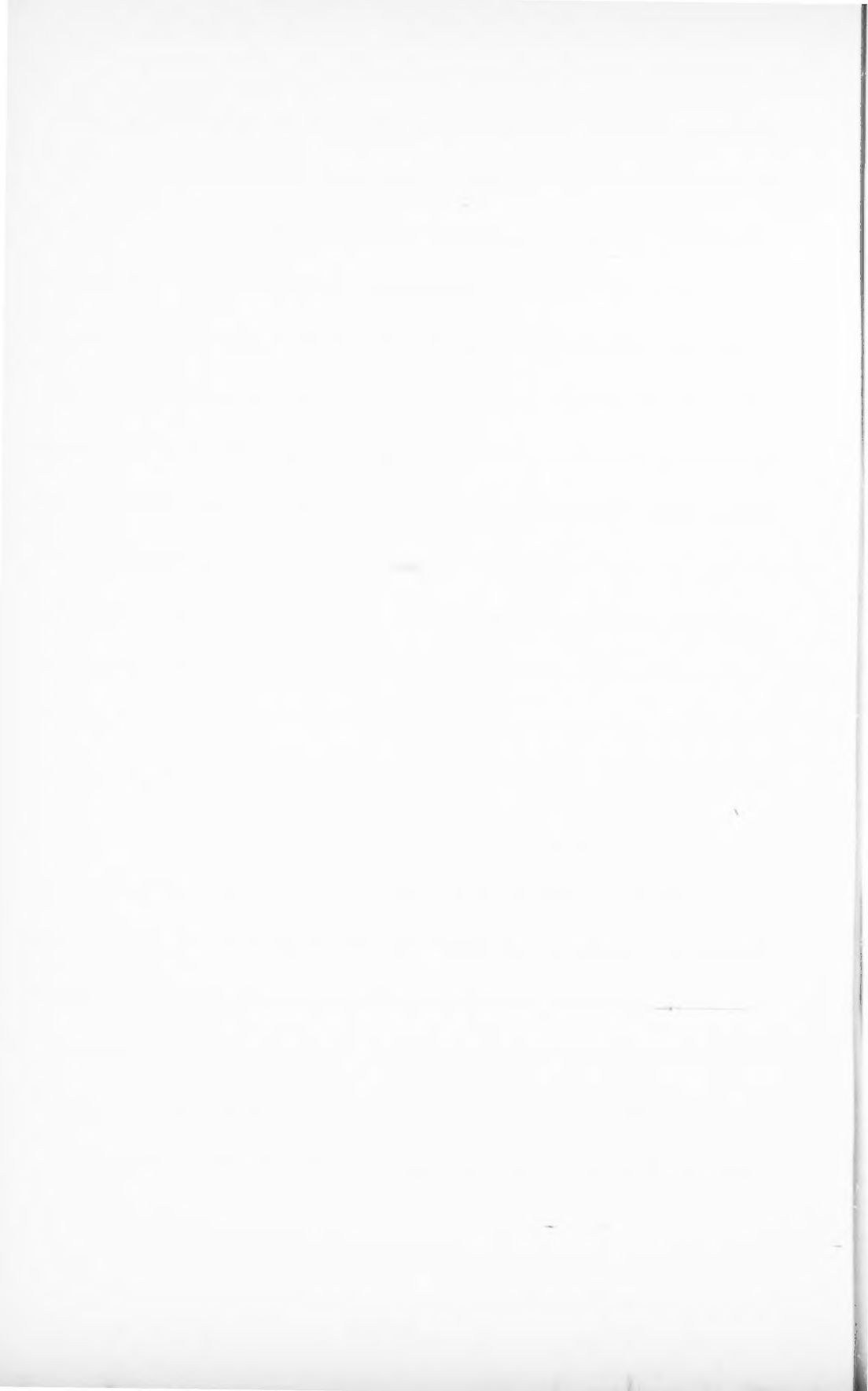
Weinberg defamed him to prospective lenders, it is extremely noteworthy that the Senate Report makes no reference to any such prospective lenders. Indeed, plaintiff's counsel has stipulated to this fact. Defendant's Exhibit E, pp. 89-92. Thus, even if plaintiff could point to any factual basis for this detail of his allegations, and even if this detail were critical to plaintiff's cause of action herein, Guccione could not rely on the Senate Report to provide a late accrual date for his tort claim against the United States. In any event, the inferences and legal theories at the basis of the present lawsuit that Guccione argues became possible only with the appearance of the Senate Report -- specifically those allegations regarding Weinberg's defamatory remarks to lenders -- are clearly inferences that any reasonable



person could have made from the ample public information available to and known by plaintiff well before March 1982.

The question whether an FTCA plaintiff knew or should have known the critical facts of his claim, and the subsidiary question of whether he exercised due diligence to discover them are ordinarily matters for the finder of fact to determine at trial. See Barrett v. United States, 689 F.2d 330. However, where, as in the present case, it is beyond dispute that plaintiff should have known and, indeed, actually knew the critical facts of his claim, summary judgment is appropriate.

The outrage expressed in the 1983 Senate Select Committee Report at the FBI's handling of the ABSCAM investigation, and particularly its distress with Melvin Weinberg's conduct during ABSCAM and with the targeting of individuals such as Guccione, might help to



make plaintiff's claims against the government in this action sympathetic ones were the legally cognizable. However, it is beyond dispute that even applying the most liberal judicial interpretation of the Congressionally mandated two year statute of limitations for FTCA claims, plaintiff's lawsuit is untimely. Plaintiff cannot rely on Congressional censure of FBI activities in ABSCAM to excuse his own clear procedural default as to any ABSCAM related claims against the government that he once, conceivably, may have had.

Conclusion

In accordance with the foregoing, defendant's motion for judgment on the pleadings on the grounds of sovereign immunity is granted. Defendant's alternate motion for summary judgment is also granted, the court having found that even under the most liberal statute of limitations rule potentially

available to plaintiff on his FTCA claim, this claim has not been timely made. Accordingly, this action is dismissed in its entirety.

Dated: New York, New York
September 10, 1987

CONSTANCE BAKER MOTLEY
U.S.D.J.